Supreme Court, U.S.
FILED

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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MERIT CONTRACTING, INC.,
Petitioner,

v.

ROBERTS & SCHAEFER COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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EDITOR'S NOTE

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-3573

ROBERTS & SCHAEFER COMPANY,
a Delaware Corporation,
Plaintiff-Appellant,

v.

MERIT CONTRACTING, INCORPORATED,
a Pennsylvania Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 95 C 217—Elaine E. Bucklo, *Judge*

ARGUED APRIL 17, 1996—DECIDED OCTOBER 30, 1996

Before POSNER, *Chief Judge,* and CUMMINGS and COFFEY, *Circuit Judges.*

COFFEY, *Circuit Judge.* Plaintiff-appellant Roberts & Schaefer Company ("R&S") sued defendant-appellee Merit Contracting, Inc. ("Merit") in the Circuit Court of Cook County, Illinois, claiming that Merit had breached its construction subcontract with R&S. Merit removed the case to federal district court on the basis of diversity of

citizenship. 28 U.S.C. §§ 1332, 1441. Merit then filed a motion to dismiss or, in the alternative, to transfer the case to the United States District Court for the Western District of Pennsylvania or stay the proceedings pending resolution of a case between the parties in Pennsylvania state court. R&S responded with a motion to remand to state court, arguing that its contract with Merit contained a forum selection clause according to which the parties agreed that (1) Illinois law would govern any contractual dispute between them, and (2) the Illinois Circuit Courts would have exclusive jurisdiction to adjudicate any such dispute. The district court rejected Merit's contention that the parties' agreement contained the forum selection clause and entered an order dismissing R&S's suit for lack of personal jurisdiction. R&S appeals. We reverse and remand.

I. BACKGROUND

R&S, a Delaware corporation with its principal place of business in Chicago, Illinois, is a design/build contractor. Merit, a Pennsylvania corporation with its principal place of business in Monongahela, Pennsylvania, engages in general construction work. R&S bid on and was awarded the contract to design and build a raw coal storage and handling facility in Washington County, Pennsylvania, for the 84 Mining Company. R&S subcontracted with Merit to perform demolition, excavation, and construction work in connection with this project, described as the "84 Mining Project".

The subcontract between R&S and Merit came about as follows. On May 25, 1993, R&S asked Merit to submit a bid to perform the previously mentioned construction services on the 84 Mining Project. To assist Merit in making its bid, R&S passed along to Merit a "bid package" prepared by 84 Mining Company. Although the bid package was never submitted to the district court, we understand from Merit's attorney's representations at oral argument that this bid package contained details of the

demolition and construction work that Merit proposed to perform. Based on the bid package, Merit submitted a bid of $1.775 million, and, on August 27, 1993, R&S accepted the bid verbally. R&S told Merit to proceed with the work, and Merit commenced work on September 1, 1993.

On September 7, 1993, R&S sent a letter to Merit confirming their Purchase Order No. 9331-711 for the demolition and construction work to be performed by Merit on the 84 Mining Project. The letter briefly described the nature of the work (demolition, excavation etc.) and listed a price of $1.775 million. The letter further stated that the confirming purchase order documents would be forwarded to Merit as soon as they were complete. At the end of September, Merit invoiced R&S for work done during that month in the amount of $154,620.00, and, in late October, R&S paid the invoice by check.

On November 1, 1993, R&S sent Merit Purchase Order No. 9331-711 and several accompanying documents (collectively, the "Purchase Order Documents". The purchase order consisted of seven pages. The first page provided a brief description of the work, while the remaining pages provided a more detailed breakdown of the work to be performed, the work completition schedule, the contract price and payment terms.[1] Accompanying Purchase Order No. 9331-711 was a document titled "Roberts and Schaefer Company Construction General Notes and Conditions" ("General Notes and Conditions"). The General Notes and Conditions contained terms relating to a wide variety of issues, including scheduling, payments, risk of loss, inspections, changes, warranties, force majeure (e.g., Acts of God), indemnification and insur-

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[1] The purchase order does not specify a dollar figure for the price of the subcontract; instead, it identifies the price merely by referring generally to the phone quote given to R&S by Merit's president on August 27, 1993.

ance, and liens. The General Notes and Conditions also included Paragraph 6.14 titled "Law Governing." This provision stated:

> This purchase order and all disputes between the parties hereto shall be governed by and construed according to the laws of Illinois whose Circuit Courts shall have exclusive jurisdiction to determine all such issues.

In addition to the General Notes and Conditions, the purchase order was accompanied by a document entitled "Sub-Contract Agreement." The Sub-Contract Agreement identified the work to be done by Merit on the 84 Mining Project as that "specified" by Purchase Order No. 9331-711; it also identified the price as $1.775 million. A representative of R&S signed the Sub-Contract Agreement, but no representative of Merit ever signed the document.

On November 11, 1993, R&S sent Merit revised pages 2, 5, and 6 of the purchase order. According to the cover letter, these pages were revised to reflect certain points regarding concrete volume and liquidated damages discussed on November 4, 1993.

As work progressed on the 84 Mine Project, Merit notified R&S on several occasions that its work was being delayed for various reasons and thus it could not fulfill the completion date. For example, in a letter dated February 4, 1994, Merit notified R&S that "[b]ecause of the continued fabrication mistakes and late deliveries, the coal run date of March 18, 1994, the finish date of April 1994 and the final completion on April 30, 1994 are in severe jeopardy. Any further delays will make it impossible to meet this schedule."

Prior to their collaboration on the 84 Mine Project, R&S and Merit had worked jointly on another construction project, the Emerald Mine Project. For that project, Merit signed a Sub-Contract Agreement dated October 22, 1992, which incorporated the identical General Notes and Conditions, including the forum selection clause.

On December 28, 1994, R&S filed suit against Merit in the Circuit Court of Cook County, alleging that it and Merit entered into a contract defined by the terms of the Purchase Order Documents. R&S further alleged that, during the course of Merit's work on the 84 Mining Project, disputes arose between the parties stemming from delays in the construction and increased costs on the Project. According to R&S, Merit (1) failed to meet certain completion dates as specified in the purchase order, (2) incurred additional costs in excess of those provided for in the contract, (3) failed to submit waivers of lien to R&S, as provided within the terms of the contract as a condition for payment, and (4) contacted the owner stating its intention to file a lien against the owner and the property for work it claims to have performed and not been paid for.

Merit removed the case to federal court pursuant to 28 U.S.C. § 1441. Thereafter, Merit filed a motion seeking the dismissal of the suit for lack of personal jurisdiction. Fed. R. Civ. P. 12(b)(2). According to Merit, it did not have the requisite "minimum contacts" with Illinois to subject it to the jurisdiction of the Illinois state courts (or a federal court in Illinois sitting in diversity).

R&S responded with a motion to remand the case back to the Circuit Court of Cook County. R&S argued that the forum selection clause contained in the General Notes and conditions vested exclusive jurisdiction in the Illinois state Circuit Courts. To establish the validity of the forum selection clause, R&S submitted to the district court a Schedule of Exhibits, which included Purchase Order No. 9331-711, the General Notes and Conditions, and the Sub-Contract Agreement. Also included in the Schedule of Exhibits was much of the correspondence between Merit and R&S, as well as the previously referred to agreement between the parties concerning the Emerald Mine Project.

The district court issued a Memorandum Opinion and Order resolving these motions. The court first considered

whether the action was properly removed from state court. In reaching the conclusion that the action was properly removed from state court, the court determined that whether the forum selection clause was part of the parties' agreement was the central issue. The court found the parties entered in a contract when R&S accepted Merit's bid to perform the work. The court further found that Merit's continued performance of the work after receiving the Purchase Order Documents in November did not constitute an acceptance of the terms of the Purchase Order Documents because Merit's continued performance was entirely consistent with the agreement formed upon R&S's acceptance of Merit's bid. Therefore, the court reasoned, the forum selection clause never became part of the parties' agreement and hence remand to the Cook County Circuit Court based on the forum selection clause was not warranted. The judge then considered Merit's motion to dismiss for lack of personal jurisdiction. The court concluded that Merit lacked sufficient minimum contacts with Illinois to justify haling Merit into the Illinois state court system under the state's long-arm statute. Accordingly, the district judge granted Merit's motion to dismiss for lack of personal jurisdiction. R&S filed a timely notice of appeal.

II. ANALYSIS

R&S claims that the district court erred in denying R&S's motion to remand to the Cook County Circuit Court and in granting Merit's motion to dismiss for lack of personal jurisdiction. In this suit based on diversity of citizenship, the parties agree that the law of Illinois governs the issue of the validity of the forum selection clause. To be precise, R&S explicitly states that Illinois law governs the validity of the clause, while Merit appears to assume that Illinois law governs. Hence, we look to Illinois law to determine the validity of the forum selection clause. *Cf. Northwestern Nat'l Life Ins. Co. v. Donovan*, 916 F.2d 372, 374 (7th Cir. 1990) (deciding validity of

forum selection clause under federal common law, where parties conceded to court the applicability of federal common law, because "litigants are, within limits not exceeded here, permitted to designate what law shall control their case").

Under Illinois law, a forum selection clause is enforceable except in exceptional circumstances. *See Calanca v. D & S Mfg. Co.*, 510 N.E.2d 21, 23 (Ill. App. Ct. 1987). Enforcing a forum selection clause in a contract is a permissible basis for remand. *See Rothner v. City of Chicago*, 879 F.2d 1402, 1416 (7th Cir. 1989). Of course, the primary question here is whether the forum selection clause in the General Notes and Conditions was ever a part of the parties' contract.

Arguing that the forum selection clause was part of the agreement between R&S and Merit, R&S points to the Purchase Order Documents that it sent to Merit. Included in these documents were the General Notes and Conditions, which in turn contained the forum selection clause. Merit's signature does not appear on any of these documents. However, R&S points out that an offeree may manifest acceptance of an offer by performing under the contract. *Landmark Properties, Inc. v. Architects Int'l-Chicago*, 526 N.E.2d 603, 606 (Ill. App. Ct. 1988); *Amelco Elec. Co. v. Arcole Midwest Corp.*, 351 N.E.2d 349, 354 (Ill. App. Ct. 1976). Here, the parties seem to agree that Merit performed work under the contract (though they do dispute whether Merit performed according to their agreement).

Merit contends, however, that its continued performance did not constitute an acceptance of the terms of the unsigned Purchase Order Documents because it was performing the work pursuant to the parties' oral agreement reached on August 27 (when R&S accepted Merit's bid over the telephone) and not pursuant to the unsigned Purchase Order Documents. According to Merit, in order for an offeree's course of conduct to operate as consent to an unsigned contract tendered after performance has

begun pursuant to an earlier oral contract, it must be clear that the offeree's conduct relates to the subsequent written contract rather than the initial oral contract. *Lundin v. Egyptian Constr. Co.*, 331 N.E.2d 208, 211 (Ill. App. Ct. 1975). If the offeree's conduct is entirely consistent with the initial contract, then the subsequently tendered contract does not control.

In the present case, Merit's conduct demonstrates that it performed according to the terms embodied in the subsequent contract (i.e., the Purchase Order Documents). For example, Merit took steps to notify R&S in writing several times of delays in construction that might jeopardize the proposed completion schedule. Merit's notifications were consistent with its acceptance of the Purchase Order Documents, which contained a construction schedule. These notifications, however, could *not* have been made pursuant to the terms of the bid package because the bid package—as we understand it based on Merit's representations to us—contained no timetable for completion of the work.

R&S identifies another example where Merit's continued performance related to the Purchase Order Documents. The record includes correspondence between Merit and R&S concerning a change in Merit's construction crews' work schedule. In this correspondence, Merit and R&S negotiated the amount of any delay penalty that might result from the new work schedule. Merit's president, Clement Gigliotti, initially proposed that Merit would be liable for only 8% of what he referred to as Merit's "contractual penalty." Later, Gigliotti faxed R&S and "signed off on the 16%" figure wanted by R&S. Then, for reasons which are unclear, the parties agreed to another (2nd) penalty provision. Ultimately, Merit and R&S signed a two-page agreement dated January 27, 1994, covering the new labor schedule, which contained the following "DELAY" clause:

> Merit is not responsible for the untimely completion of the project. Consequently Merit will NOT share

> in Merit's contractual penalty, if in fact there is an untimely completion, and that 84 Mining Co. holds R&S responsible for a delay by invoking the penalty payment in full under the contract.

The course of the negotiations concerning this change in the crews' work schedule clearly demonstrates that Merit knew of the language of the "DELAY" clause. Merit's acknowledgement of a "contractual" delay penalty in that clause is inconsistent with its position that the bid package constituted the entire agreement between the parties because, as far as we know, the bid package contained no penalty provision. Accordingly, R&S has produced evidence sufficient to convince us that Merit's performance operated as an acceptance of the offer contained in the Purchase Order Documents.

Having concluded that R&S has produced evidence of an offer and an acceptance we turn to the issue of consideration. The various documents cited by R&S provide for consideration in the amount of $1.775 million. In addition, Merit invoiced R&S and was paid for at least part of the work it performed. Thus, R&S has produced evidence that the contract provided for consideration and that R&S made partial payment under the contract. Together with the evidence of an offer and an acceptance, R&S has provided prima facie evidence of a contract. *Scutt v. LaSalle County Board,* 423 N.E.2d 213, 217 (Ill. App. Ct. 1981).

Once the plaintiff produces evidence establishing a prima facie case that a contract exists, Illinois law shifts the burden of production to the defendant to offer any evidence to the contrary. *Ambrose v. Thornton Township School Trustees,* 654 N.E.2d 545, 683 (Ill. App. Ct. 1995); *Anderson v. Department of Public Property,* 489 N.E.2d 12, 16 (Ill. App. Ct. 1986).[2] Merit points

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[2] Although in diversity cases federal law governs matters of procedure, *see Smith v. Equitable Life Assurance Society,* 67 F.3d

to Gigliotti's affidavit, which states that "[n]o one from Merit signed [the Purchase Order Documents] because the terms were unacceptable and did not represent the parties' agreement." We find this self-serving assertion incredible in light of the surrounding facts of this case. As discussed previously, certain aspects of Merit's conduct during the course of its performance suggest that Merit believed that the terms of the Purchase Order Documents represented the parties' agreement. R&S's letter of November 11, 1993, demonstrates that the parties negotiated certain terms contained in the purchase order. If, as Merit now claims, the bid package came to embody all the terms of the subcontract when Merit's bid was accepted verbally on August 27, then why was Merit negotiating with R&S over the terms of the purchase order in November? In addition, why did Merit acknowledge in January 1994 that it was subject to a "contractual" delay penalty when only the Purchase Order Documents contained such a provision? As for the claim in Gigliotti's affidavit that the terms of the Purchase Order Documents were unacceptable, Merit has failed to present any evidence that it had any concerns or expressed any objection to R&S regarding the forum selection clause or any other provision contained in the General Notes and Conditions. Perhaps most damaging to Merit's claim that the General Notes and Conditions were unacceptable to it is that, for the Emerald Mine Project, Merit agreed to *exactly the same General Notes and Conditions.* As the record stands, if the Purchase Order Documents, including the General Notes and Conditions, do not constitute the terms of the subcontract between Merit and R&S, then we are at a loss to understand what does.

611, 615 (7th Cir. 1995), state law governs questions regarding which party bears the burden of proof on a particular issue, *see Sundstrand Corp. v. Standard Kollsman Indus.*, 488 F.2d 807, 813 (7th Cir. 1973); *Erving Paper Mills v. Hudson-Sharp Mach. Corp.*, 332 F.2d 674, 677 (7th Cir. 1964).

As we have noted, Merit's theory is that the terms contained in the bid package, along with Merit's bid of $1.775 million, together constitute the terms of the subcontract. As previously discussed, Merit's continued performance appears to be consistent with the terms of the Purchase Order Documents rather than the bid package. We see two additional problems with Merit's theory. First, the bid package was not included in the record presented to this court. Thus, we have no way of determining whether the bid package contains the type of terms that could possibly constitute a valid and enforceable contract. Merit attempts to lay the blame for this situation on R&S, arguing that the burden is on the plaintiff (R&S) to establish the existence and terms of the contract. Although this is true, *see Perlman v. Time, Inc.*, 478 N.E.2d 1132, 1136 (Il. App. Ct. 1985), as we pointed out above, R&S met its obligation by producing prima facie evidence that the contract was defined by the Purchase Order Documents. If Merit believed that the contract was fully encompassed in the bid package, then it was incumbent upon Merit to make sure that the bid package was part of the record. A second problem with Merit's theory that the bid package contained the terms and conditions of the subcontract is that, at oral argument, Merit's attorney conceded that the bid package merely defined the scope of the work, that is, what construction services were to be performed on the 84 Mining Project. Without a doubt, the scope of the work is an integral part of a construction contract. However, as described by Merit's attorney ,the bid package contained none of the many terms—terms regarding insurance, payment schedules, completion dates etc.—that one would expect in a complex construction subcontract worth nearly $2 million. Merit has thus failed to produce any credible evidence to dispute R&S's evidence that the agreement between Merit and R&S contained the General Notes and Conditions, and hence, the forum selection clause. Accordingly, we hold that the district court committed

clear error in finding that the subcontract did not contain the forum selection clause. *See Ambrose,* 654 N.E.2d at 683 ("In the absence of evidence to meet a plaintiff's prima facie case, a ruling in favor of the plaintiff is warranted as a matter of law."); Fed. R. Civ. P. 52(a).

Although the forum selection clause clearly specifies the Circuit Court of Cook County, Illinois, as the exclusive forum for resolving the parties' dispute, Merit nevertheless argues that the court need not strictly enforce it. We reject this argument, as it is based on nothing more than a few inapposite cases. Specifically, Merit points to *National Hydro Sys. v. Summit Constructors, Inc.,* 731 F. Supp. 264 (N.D. Ill. 1989), and *G.H. Miller & Co. v. Hanes,* 566 F. Supp. 305 (N.D. Ill. 1983). The issue in each of those cases, however, was whether a forum selection clause controlled the court's decision on a motion for a change of venue pursuant to 28 U.S.C. § 1404. The factors that guide a district court's decision on a motion for a change of venue differ from those that guide a decision on a motion for remand based on a forum selection clause. On a motion for a change of venue, a district court considers the plaintiff's choice of forum, the convenience of the parties and the witnesses, as well as the interest of justice. 28 U.S.C. § 1404(a). In contrast, under Illinois law, a court contemplating enforcing a forum selection clause in a contract that was freely entered into between parties of roughly equal bargaining power generally considers only one issue: whether the objecting party would effectively be deprived his day in court. *Calanca,* 510 N.E.2d at 23-24. In the present case, although resolving the dispute between Merit and R&S in Illinois may well be less convenient to Merit than resolving the dispute in Pennsylvania, it would not deprive Merit of its day in court. Therefore, there is no basis for not enforcing the forum selection clause.

III. CONCLUSION

The judgment of the district court is reversed. The case is remanded to the district court with directions to remand the case to the Circuit Court of Cook County, Illinois.

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DISTRICT

Case No. 95 C 0217

ROBERTS & SCHAEFER COMPANY,
a Delaware Corporation,
Plaintiff,

v.

MERIT CONTRACTING, INC.,
a Pennsylvania corporation,
Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff, Roberts & Schaefer Company ("R&S"), filed a complaint against defendant, Merit Contracting, Inc. ("Merit"), in the Circuit Court of Cook County on December 28, 1994. On January 12, 1995, Merit removed the action to this court pursuant to 28 U.S.C. § 1441 on the basis of diversity of citizenship.

R&S is a contractor incorporated in Delaware with its principal place of business in Chicago, Illinois. Merit is a Pennsylvania corporation and has its principal place of business in Monongahela, Pennsylvania. In summer 1993, R&S accepted Merit's bid to complete work in connection with the demolition, excavation, foundations and erection of a raw coal storage and handling facility at the Eigthy-Four Mining Company in Pennsylvania. In September 1993, R&S sent Merit a letter confirming its purchase order relating to the work, and Merit began the job. R&S claims that during the project, disputes arose between the parties regarding delays which increased costs and postponed completion dates. R&S alleges that Merit has not submitted to R&S waivers of lien along with its

invoices and has informed the owner of the Eigthy-Four Mining Company of its intention to file a lien against the owner and the property for work performed under the purchase order but for which R&S has not paid. As a result, the owner is withholding payments from R&S. R&S asserts that Merit's actions have breached the parties' contract and injured R&S.

Merit has filed a motion to dismiss or, in the alternative to transfer or stay the proceedings. In response, R&S has filed a motion to remand the case to the circuit court. For the following reasons, R&S' motion is denied, and Merit's motion to dismiss is granted on the basis that this court does not have personal jurisdiction over Merit.

Whether this Action was Properly Removed

28 U.S.C. § 1441 permits a defendant to remove an action from state court to federal court if the federal court would have had jurisdiction over the lawsuit as originally filed by the plaintiff. Merit, as the party seeking to preserve removal, has the burden of establishing that this court has jurisdiction over the present case. *Casey v. Hinckley & Schmitt, Inc.*, 815 F. Supp. 266, 267 (N.D. Ill. 1993). Remand to the state court is necessary if I decide that jurisdiction is lacking. *Id.* District judges may remand a removed case to state court based either on statutory grounds under 28 U.S.C. § 1447(c) or for non-statutory, common law reasons. *Rothner v. City of Chicago,* 879 F.2d 1402, 1406, 1410-11, 1416 (7th Cir. 1989). Non-statutory grounds include the application of contract law to enforce forum selection clauses under the reasoning that defendants who have agreed to such clauses have, in effect, waived their removal rights. *See e.g. Colonial Bank & Trust v. Cahill,* 424 F. Supp. 1200, 1204 (N.D. Ill. 1976); *Foster v. Chesapeake Insurance Company, Ltd.*, 933 F.2d 1207, 1215-1218 (3d Cir. 1991); *Pelleport Investors v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 279-81 (9th Cir. 1984) (cited by

Rothner v. City of Chicago, supra, 879 F.2d at 1416); *Karl Koch Erecting Co., Inc. v. New York Convention Center Development Corporation,* 838 F.2d 656, 659 (2d Cir. 1988).[1]

R&S nevertheless argues that Merit waived its right to remove this lawsuit to federal court by agreeing to the following forum selection clause:

> This purchase order and all disputes between the parties hereto shall be governed by and construed according to the laws of Illinois whose Circuit Courts shall have exclusive jurisdiction to determine all such issues.

R&S Memo., Ex. A, p. 113. Courts have remanded cases involving similar forum selection clauses to state court. *See e.g. Pelleport Investors v. Budco Quality Theatres, Inc., supra,* 741 F.2d at 275, 280; *Karl Koch Erecting Co., Inc. v. New York Convention Center Development Corporation, supra,* 838 F.2d at 659. Before reaching the issue of whether this particular forum selection clause waived Merit's removal rights, it is necessary to determine whether this clause was part of the agreement between R&S and Merit.

In order to form a contract, each party must assent, and the essential terms must be definite and certain. *Soderholm v. Chicago National League Ball Club, Inc.,* 225 Ill. App. 3d 119, 587 N.E.2d 517, 519, 167 Ill. Dec. 248 (1st Dist. 1992); *Bielecki v. Painting Plus, Inc.,* 264 Ill. App. 3d 344, 637 N.E.2d 1054, 1061, 202 Ill. Dec. 318 (1st Dist. 1994). Furthermore, "a course of conduct may act as consent to a contract, [but] it must

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[1] R&S does not argue that removal was improper for lack of diversity jurisdiction. R&S and Merit are of diverse citizenship, and R&S does not contest Merit's allegation that the amount in controversy exceeds $50,000.00. Accordingly, Merit's removal to federal court based on diversity jurisdiction is appropriate. *See* 28 U.S.C. § 1332.

be clear exactly what contract the conduct relates to." *Lundin v. Egyptian Construction Co., Inc.*, 29 Ill. App. 3d 1060, 331 N.E.2d 208, 211 (1st Dist. 1975).

R&S and Merit agree that R&S accepted Merit's bid to complete work for a project at the Eighty-Four Mining Co. R&S sent a confirming letter to Merit on September 7, 1993 stating that it had issued purchase orders for Merit to complete certain construction services at the Eighty-Four Mining Co. for a price of $1,775,000.00 as well as electrical work for $265,000.000. R&S Memo., Ex. A, p. 164. This letter indicates R&S' acceptance of Merit's bid and the parties' agreement that Merit would perform particular work for a specific price. *Id.*; Merit's Memo., Ex. A to Ex. D. The parties' agreement to these essential terms formed a contract. *See B & C Electric, Inc. v. Pullman Bank and Trust Company*, 96 Ill. App. 3d 321, 421 N.E.2d 206, 210, 51 Ill. Dec. 698 (1st Dist. 1981); *Bielecki v. Painting Plus, Inc., supra*, 637 N.E.2d at 1062. Merit commenced work on the project on September, and on September 30th sent R&S the first invoice in the amount of $154,620.00, which R&S subsequently paid in full. Merit Aff. ¶¶ 8, 9.

On November 1, 1993, R&S sent to Merit Purchase Order No. 9331-711 and other documents relating to the Eighty-Four Mining Co. project. R&S argues that the "Roberts and Schaefer Company Construction General Notes & Conditions" ("General Notes & Conditions"), R&S Memo., Ex. A, pp. 92-131, which contained the forum selection clause, was sent to Merit at this time and became part of its contract with Merit. However, Merit's affidavit, uncontradicted by any opposing affidavit, deposition or other evidence from R&S, states that "[n]o one from Merit signed [the documents forwarded on November 1, 1993] because the terms were unacceptable and did not represent the parties' agreement." Merit Aff. ¶ 10.

R&S has submitted no evidence that would support its position that the parties' agreement contained the General

Notes & Conditions.[2] The General Notes & Conditions do not include a date, either party's signature, the purchase order number 9331-711) or any description of the job (*e.g.*, "Eighty-Four Mining Co."). The document uses the generic terms "subcontractor" and "seller" and does not identify Merit as such. Furthermore, none of the documents R&S cites to in its briefs as comprising its contract with Merit incorporate the General Notes & Conditions by reference.

R&S argues that even if Merit never signed the contract documents it accepted the terms of the contract through its actions. It relies on *Amelco Electric Co., Inc. v. Arcole Midwest Corp.*, 40 Ill. App. 3d 118, 351 N.E.2d 349 (1st Dist. 1976) and *Landmark Properties, Inc. v. Architects International-Chicago*, 172 Ill. App. 3d 379, 526 N.E.2d 603, 122 Ill. Dec. 344 (1st Dist. 1988), in support of its position.

In *Amelco, supra*, 351 N.E.2d at 351, the subcontract documents contained a document labeled as an appendix which related to "estimated manhours to be worked by minority persons" and was to be completed and signed by the plaintiff for transmittal to the City of Chicago. The plaintiff did execute the necessary papers "and on eight separate days plaintiff submitted written contractor's reports to the City in accordance with the written agreement." *Id.* at 354. Thus, the evidence in *Amelco* demon-

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[2] The record before me consists of the complaint with its attachments, which included the purchase order sent by R&S on November 1, 1993, various change orders and a second purchase order; a praecipe for writ of summons in the Pennsylvania action and the complaint in that action; and the affidavit of Merit's president, with attachments. In ascertaining whether removal is proper, the court may examine the record as a whole. *Casey v. Hinckley & Schmitt, Inc.*, 815 F. Supp. 266, 267 (N.D. Ill. 1993). R&S has referred in its brief in support of its motion to remand to various exhibits neither attached to the complaint nor supported by affidavit. Nevertheless, even if all of those documents are considered, there is no evidence to support R&S's argument.

strated that the plaintiff acted to carry out at least some of the written terms of the proposed subcontract. In this case, there is no evidence that Merit acted on any specific written term contained in the General Notes & Conditions or any particular document (other than the letter confirming R&S' acceptance of Merit's bid).

Moreover, in *Amelco*, the parties apparently agreed that the proposed subcontract was comprised of a discrete set of documents, which contained the term (a specific waiver of mechanics' lien) that the plaintiff was found to have accepted through its conduct. *Id.* at 352-53. In this case, the parties have not agreed on exactly what documents constituted the proposed subcontract. Unlike the *Amelco* court which found that the relevant term was in the proposed subcontract, I cannot conclude that the term at issue, found in the General Notes & Conditions which contains the forum selection clause, was part of the proposed subcontract here.

The court in *Landmark Properties* concluded that a party who never signed an architect's American Institute of Architects ("AIA") contract was nevertheless bound by its provisions because the party informed the architect that payment would be forthcoming provided all services were performed "in accordance with the AIA contract" and, in addition, filed a submission (later withdrawn) to mediation under the AIA contract. *Landmark Properties, Inc. v. Architects International-Chicago, supra*, 526 N.E.2d at 606. Although R&S argues that Merit engaged in similar conduct indicating acceptance in this case, there is no evidence to support its contention.

R&S apparently maintains that Merit's reference to a "force majeure situation" in its letter of October 12, 1993 indicates Merit's agreement to the General Notes & Conditions since the phrase 'force majeure" is found in paragraph 6.8 of that document. R&S Memo., Ex. A, pp. 73, 111. I cannot agree. Merit wrote the letter to notify R&S of a "force majeure situation" which caused *Merit*

to cease work. The force majeure clause in the General Notes & Conditions does not relate to force majeure circumstances encountered by Merit but only to the effect of such circumstances on R&S:

> In the event of causes beyond the control of Buyer [*i.e.*, R&S], including but not limited to acts of God, fire, the elements, strikes or labor disputes, and accidents or transportation difficulties, which would make it unreasonable in Buyer's judgment to accept delivery hereunder, Buyer shall have the option to cancel this purchase order or to delay the delivery or completion of all or part of the items, such cancellation or delay being without cost to Buyer.

R&S Memo., Ex. A, p. 111.

R&S also attempts to show that the General Notes & Conditions were incorporated into the parties' agreement via their January 27, 1994 Agreement discussing "General Conditions" in the following manner:

> All additional General Conditions including supervision, etc., required due to this accelerated and extended schedule inclusive of overtime, will be charged by Merit to R&S.

R&S Memo., Ex. A, p. 172. The phrase "General Conditions" is clearly different from "Roberts & Schaefer General Notes & Conditions."

R&S additional contention that some of the purchase orders sent by R&S to Merit stated "[t]erms and conditions shown on Roberts & Schaefer P.O. #9331-711 will apply" does not establish Merit's agreement to the General Notes & Conditions since the General Notes & Conditions document was not "shown on" purchase order no. 9331-711 or referenced by any of the items listed in that purchase order which have been submitted to the court.

In summary, R&S has failed to provide any evidence showing that Merit signed the General Notes & Condi-

tions or agreed to the particular terms of that document through its actions. R&S has not rebutted Merit's sworn statement that Merit did not accept the terms of the papers sent it on November 1, 1993 (which allegedly included the General Notes & Conditions) and did not sign them. Accordingly, based on the evidence before the court, the contract between R&S and Merit did not contain the General Notes & Conditions, which includes the forum selection clause.[3] Because I find that the forum selection clause has not been shown to be a term of the parties' agreement, remand to the circuit court based on this clause is not warranted.

Whether this Court has Personal Jurisdiction over Merit[4]

Jurisdiction in this case is based on diversity of citizenship. A federal district court in Illinois has personal jurisdiction over a party involved in a diversity action only if an Illinois state court would have personal jurisdiction. *Michael J. Neuman & Asociates, Limited v. Florabelle Flowers, Incorporated*, 15 F.3d 721, 724 (7th Cir. 1994). The burden of proving jurisdiction over a nonresident defendant rests with the plaintiff. *Publications International Ltd. v. Simon & Schuster, Inc.*, 763 F. Supp. 309, 310 (N.D. Ill. 1991); *Wysnoski v. Millet*, 759 F. Supp. 439, 442 (N.D. Ill. 1991) (citing *Saylor v. Dyniewski*, 836 F.2d 341, 342 (7th Cir. 1988)). In deciding a motion to dismiss for lack of personal jurisdiction, I am obliged to accept all of the facts alleged by R&S in its

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[3] R&S apparently argues that a determination that the parties' agreement did not include the General Notes & Conditions in effect finds that the agreement had no terms and conditions. I disagree. The parties may have agreed to terms other than those in the General Notes & Conditions, such as those on the back of the purchase order or in the document titled "scope of work." Whether or not they did is a question for another day.

[4] Merit's removal of this action from state to federal court did not waive its objection to in personam jurisdiction. *Allen v. Ferguson*, 791 F.2d 611, 614 (7th Cir. 1986).

complaint and not denied by Merit and to resolve all factual disputes in favor of R&S, the party seeking to establish jurisdiction. *Diamond Mortgage Corporation of Illinois v. Sugar*, 913 F.2d 1233, 1245 (7th Cir. 1990) (citing *Saylor v. Dyniewski, supra*, 836 F.2d at 342); *Deluxe Ice Cream Company v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1215 (7th Cir. 1984) (citations omitted).

In the past, a non-resident defendant was subject to suit in Illinois only if she (1) performed one of the enumerated acts in the Illinois long-arm statute; and (2) had the minimum contacts with Illinois required by the due process guarantee. *Mors v. Williams*, 791 F. Supp. 739, 741 (N.D. Ill. 1992) (citing *FMC Corp. v. Varonos*, 892 F.2d 1308, 1310 (7th Cir. 1990)). As of September, 1989, however, the Illinois long-arm statute has included a "catch-all" provision, stating that

> [a] court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.

735 ILCS 5/2-209(c). This "catch-all" provision makes contiguous the parameters of jurisdiction under the Illinois long-arm statute and the requirements of due process under the United States and Illinois constitutions and, therefore, renders unnecessary an inquiry as to whether the defendant performed one of the enumerated acts under the long-arm statute. *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 945 (7th Cir. 1992); *Chemical Waste Management, Inc. v. Sims*, 870 F. Supp. 870, 873 (N.D. Ill. 1994) (and cases cited therein). Accordingly, to resolve Merit's motion to dismiss based on lack of personal jurisdiction, I will determine whether exercising jurisdiction over Merit would satisfy the due process guarantees of the United States and Illinois Constitutions. *See Chemical Waste Management, Inc. v. Sims, supra*, 870 F. Supp. at 873.

Federal due process requires an Illinois court to exercise jurisdiction over a defendant who has "certain mini-

mum contacts with [Illinois] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Michael J. Neuman & Associates, Limited v. Florabelle Flowers, Incorporated, supra*, 15 F.3d at 725 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). A defendant who "purposefully avails himself of the privilege of conducting activities within the forum state" satisfies this test. *Dehmlow v. Austin Fireworks, supra*, 963 F.2d at 946 (citations omitted). Courts must consider foreseeability—whether the defendant's contacts with the forum state are such that he could have anticipated being haled into court in that state. *Heritage House Restaurants v. Continental Funding*, 906 F.2d 276, 283 (7th Cir. 1990).

The parties agree that Merit is a Pennsylvania corporation and has its principal place of business in Monongahela, Pennsylvania. R&S' complaint does not contain any allegations connecting Merit to Illinois. Merit's uncontradicted affidavit asserts that Merit does some work in Ohio, West Virginia and Maryland but that "Merit has never engaged in or solicited business in the State of Illinois and owns no personal or real property in Illinois." Merit Aff. ¶ 3. Moreover, Merit dealt with R&S exclusively through its office in Monroeville, Pennsylvania. *Id.*[5] For example, Merit sent an invoice in the

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[5] The unsigned subcontract agreement attached to R&S' complaint states:

> As the Work progresses ninety percent (90%) of the value of the completed Work done from month to month, shall be paid to the Subcontractor within ten (10) days of the receipt thereof by the Contractor from the Owner, provided, that a separate requisition for labor and material on a form supplied by the Contractor be delivered to the offices of the Contractor at 120 S. Riverside Plaza, Chicago, Illinois 60606 not later than the 25th day of the month during which the work covered thereby was done . . . .

Complaint, Ex. A, p. 117. Paragraph 3 of Merit's affidavit sufficiently denies that it dealt with R&S' office in Chicago. To create

amount of $154,620.00 for services rendered in September, 1993 to R&S at is Pennsylvania office, and R&S issued Merit payment of the amount invoiced from that office. Mert Aff. ¶¶ 8, 9. The "Construction Documents" contained in Exhibit A to R&S' memorandum of law list R&S' Pennsylvania address rather than its Illinois address. The only reason before me therefore shows that Merit does not have any, let alone minimum, contacts with Illinois. Accordingly, haling Merit into an Illinois court would violate the due process clause of the United States Constitution. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1984).

Conclusion

For the foregoing reasons, R&S' motion to remand to the state court is denied, and Merit's motion to dismiss for lack of personal jurisdiction is granted.[6]

ENTER ORDER:

/s/ Elaine E. Bucklo
ELAINE E. BUCKLO
United States District Judge

Dated: September 29, 1995.

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a factual dispute on this issue, R&S was obligated to submit evidence such as an affidavit or deposition, which it did not.

[6] My decision that this court lacks personal jurisdiction over Merit renders unnecessary a resolution of Merit's remaining motions.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

November 21, 1996

Before HON. RICHARD A. POSNER, Chief Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge

No. 95-3573

ROBERTS & SCHAEFER COMPANY,
a Delaware Company,
Plaintiff-Appellant

v.

MERIT CONTRACTING, INCORPORATED,
a Pennsylvania Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 95 C 217—Elaine E. Bucklo, Judge

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by defendant-appellee Merit Contracting, Inc., no judge in active service has requested a

vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing is DENIED.

[Transcript of Argument April 17, 1996]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-3573

ROBERTS & SCHAEFER COMPANY,
a Delaware Corporation,
Plaintiff-Appellant,

-VS-

MERIT CONTRACTING, INCORPORATED,
a Pennsylvania Corporation,
Defendant-Appellee.

January 27, 1997

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[2] MS. JOHNSON: Good morning. May it please the Court, my name is Linda Johnson here on behalf of the Appellant, Roberts & Schaefer, who was the plaintiff in the case below.

The case is before you this morning on Judge Bucklo's order, which denied Roberts & Schaefer's motion to remand this case back to the Circuit Court of Cook County, Illinois.

The basis for the motion to remand was a forum selection clause found in a contract between Roberts & Schaefer Company and the Defendant, Merit Contracting. Judge Bucklo found, however, that this particular forum selection clause was not actually a part of the contract.

Any time that a party is told that a portion of its contract doesn't exist is a material problem and can affect anything that happens down the road.

We are asking this Court to reverse the judgment entered by Judge Bucklo and to remand this Court—this case back to the District Court with instructions that it be remanded back to the Circuit Court of Cook County where it belongs.

Your Honor, as I mentioned, the basis for this case is that in the contract documents, there exists a [3] forum selection clause found at Section 6.14 of what are termed, General Terms and Conditions, if you will.

This clause in no uncertain terms states that all disputes arising out of this contract will be decided by the Circuit Courts of Cook County who have exclusive jurisdiction to hear any such matters arising out of the contract. Therefore, we see it as being very clear that that's where the case belongs.

The case arrived in Federal Court on motion of Merit to remove it to the District Court, and that is how Merit filed its motion to dismiss upon which we countered with our motion to remand, and that is the basis of the Judge —Judge Bucklo's ruling.

If you look at certain cases that we have cited in our briefs, most notably Amelco Electric and Landmark, you will see that the Illinois Courts have found that a contract can be enforced by the fact that the parties have performed according to the terms.

In this case, there is some problem because the subcontract was not signed by Merit. We recognize that, and that is probably the basis for some confusion below. However, in looking at the exhibits which we have filed, there exists numerous references to the purchase order.

Merit makes reference to the purchase order, [4] Roberts & Schaefer makes references to the purchase order. It is really beyond us how the Court below determined that the particular clause is not a portion of the contract.

We know from Illinois law that a contract can be deemed in force by the fact that the parties have performed according to it even in the absence of a signature.

Therefore, we do not believe that because the contract wasn't signed that that's a material defect.

Merit performed according to the contract, it requested payment under the contract, it got payment under the contract.

Subsequent—

JUDGE 1: So what is it that—what is it that Merit considers to be the—the contract?

MS. JOHNSON: Merit claims that the contract was formed at the time that Roberts & Schaefer accepted its bid to perform certain work at this project in Pennsylvania.

JUDGE 1: Well, what document do they say is—states the terms of the contract?

MS. JOHNSON: Upon—upon my review of the exhibits filed with their brief, your Honor, they did not attach [5] the bid documents. They make reference to it in some of their underlying documents, and they say that they did not attach it because it was too voluminous. It consisted of specifications, drawings, blueprints, things that weren't really relevant.

Therefore, Merit contends that the contract itself was formed when Merit's offer was verbally accepted by Roberts & Schaefer.

JUDGE 1: So where are these General Terms and Conditions you're talking about?

MS. JOHNSON: They appear several times throughout the appendix, most notably at Appellant's Exhibit page 65.

JUDGE 1: Well, where is this in this exhibit's volume?

MS. JOHNSON: That's the exhibits that we submitted to Judge Bucklo.

JUDGE 1: It says, Schedule of Exhibits.

MS. JOHNSON: Yes, okay. That would be at Appellant's Exhibit page 259.

JUDGE 1: I don't see a 259.

MS. JOHNSON: It's Bates number—

JUDGE 1: Here, you show me where it is.

MS. JOHNSON: It's Bates—

[6] JUDGE 1: Why don't you come up here and show me where it is.

MS. JOHNSON: Okay. Okay. I see the confusion. Your Honor, this particular exhibit was resubmitted with our apen—Appellant's Exhibit at 259. I'll be able to find it. Okay. 18, 17. I was referring to the Appellant's appendix, not necessarily this one, that went to Judge Bucklo.

JUDGE 1: Well, we have two more volumes, but this is it. Did you find it?

MS. JOHNSON: Yes. It begins with that preprinted page and goes on quite a bit.

JUDGE 1: Okay. So this is what you con—what you argue is the contract?

MS. JOHNSON: That's correct.

JUDGE 1: A part of the contract.

JUDGE 2: Why was the verbal acceptance enough?

MS. JOHNSON: The verbal acceptance was the fact that Roberts & Schaefer agreed to pay Merit $1.775 million to perform certain work at the 84 Mine.

There's also in the exhibit a quote that Merit provided to Roberts & Schaefer, however, that's just money. Our position is is that a contract may have been formed at that—

[7] JUDGE 1: Well, do they think that it's a purely oral contract they have with you?

MS. JOHNSON: They're disputing the terms, and they're basically saying that this forum selection clause was not part—

JUDGE 1: Now, look, are they—is it their position that they have an oral contract with you or a written contract?

MS. JOHNSON: I—I don't believe that that distinction has really been made in any of the pleadings.

JUDGE 3: Is it their position that the purchase order which you accepted and which you began to perform on is a contract?

MS. JOHNSON: We issued the purchase order to Merit, and Merit's position is saying that this purchase order in writing wasn't issued until November, however, Roberts & Schaefer had verbally accepted Merit's bid, I believe it was in August of '93.

JUDGE 3: And they began to perform on it?

MS. JOHNSON: And that's what they're claiming is the contract was—

JUDGE 3: Right, on the purchase order.

MS. JOHNSON: —the acceptance of the bid. Right. [8] And then later on, —

JUDGE 1: Well, wait a second, wait a second. What do you mean by the purchase order?

MS. JOHNSON: In September 7th of 1993, Roberts & Schaefer sent a letter to Merit forwarding a letter saying that we have issued to Merit purchase order number 9331-711.

JUDGE 1: Now, these are your General Terms and Conditions.

MS. JOHNSON: The General Terms and Conditions are part of the terms and conditions of the purchase order.

JUDGE 1: Yes, but look, I want to know what is their conception, Merit's conception, of the contract. They don't think this is part of the contract.

MS. JOHNSON: That's correct.

JUDGE 1: But you answered—well, anyway. What do they think the contract is? Is it an oral contract or is there any document that they think is a—is a document of the contract?

MS. JOHNSON: From what we can tell, Judge, it would appear as though they're just saying it's an oral acceptance based on Roberts & Schaefer acceptance of the bid, meaning that Merit will perform this work for X amount of dollars, and that's the end of the contract. [9] Construction industry contracts don't work that way.

JUDGE 3: Then why don't you object to it as this was going all along?

MS. JOHNSON: Well, on September 7th of 1990—

JUDGE 3: Including the forum selection clause.

MS. JOHNSON: On September 7th of 1993, Roberts & Schaefer sent a letter to Merit saying that these confirming purchase order documents would be forwarded. That was done in November, and this is the preprinted version which you see in front of you. It's a preprinted form that lists the work to be done. Attached to that are various other terms and conditions. There's a scope of work document. There were some things that were voided because—

JUDGE 1: So you sent this to them, and your argument is that because they didn't protest it, they were bound. Now, in this—in the dealings of the parties before you came to blows, did they comply with the terms in this purchase order?

MS. JOHNSON: Well, somewhere along the way there became some disputes as to delays and things, and the scheduling of the contract became an issue of dispute, [10] and that's how the underlying lawsuit came to be.

JUDGE 1: Yes, I know, but was there a period before the dispute when they were complying with the terms of this purchase order?

MS. JOHNSON: From the fact that they were doing the work, accepting payment, I would have to say sure.

JUDGE 1: But were you paying in accordance with the purchase order or in accordance with some other argument you had with them?

MS. JONHSON: Well, the purchase order controls, and that was the intent all along.

JUDGE 1: That's the issue.

MS. JOHNSON: Exactly.

JUDGE 1: My question is did you—were you billing them in accordance with the purchase order, and were they paying in accordance with that?

MS. JOHNSON: Oh, sure. The Merit invoices even reflect the number of the purchase order. I think that's very clear. They sought payment under the purchase

order not only before the date of the purchase order but afterwards, and they never once—

JUDGE 1: So you billed them—

MS. JOHNSON: —objected.

JUDGE 1: You billed them with a reference number, [11] and they actually paid?

MS. JOHNSON: That's correct, up to a certain point in time until the disputes actually became—

JUDGE 3: And they never made any objections to it?

MS. JOHNSON: None at all, your Honor. Now, Merit will claim that they objected to the contract and that's why they never signed it, however, they never objected to the forum selection clause or any of the other specific parts in it, and it wasn't until this lawsuit was instigated that that was made known.

They had plenty of time all the way through 1994 when they had additional work purchase orders issued. It even says, the terms and conditions of this purchase order will apply.

They could have objected then. They didn't, and that's our point, is that through their performance, these clauses control. They knew that. They didn't object, and on that basis, our motion to remand to the Circuit Court of Cook County should be granted because that's where this case belongs.

JUDGE 1: Okay. Thank you, Ms. Johnson.

MS. JOHNSON: Thank you.

JUDGE 1: Mr. Moelmann?

MR. MOELMANN: May it please the Court. I'm [12] Lawrence Moelmann on behalf of the defendant, Merit Contracting, Inc.

Let me first address the issues that were raised by the Court. As far as the contract is concerned, we submitted an affidavit of Clem Gigliotti, who is the president of Merit Contracting. This is attached as part of the appendix to our brief and was presented to the District Court.

He stated that in May of 1993, Roberts & Schaefer presented a bid package to Merit Contracting that was

issued by the owner of this construction project at a coal mine in Pennsylvania. 84 Mining is the name of the owner.

Pursuant to this bid package, which is—

JUDGE 1: This was a bid package that had been prepared by the owner of the mine rather than by Roberts & Schaefer?

MR. MOELMANN: Yes, although there may have been additional parts, provisions submitted by Merit.

JUDGE 1: What do you mean may have been? Were there or weren't there?

MR. MOELMANN: I believe that there—

JUDGE 1: By Merit, but what about Roberts? Roberts & Schaefer forwarded you—forwarded to you [13] this bid package prepared by the owner of the mine.

MR. MOELMANN: Yes.

JUDGE 1: Yes, and what else?

MR. MOELMANN: And they would have included certain quantities and said, these are the sections of the work that we want you to perform as part of the overall—

JUDGE 1: Roberts & Schaefer said that?

MR. MOELMANN: Yes.

JUDGE 1: And then what?

MR. MOELMANN: And Merit then prepared a bid pursuant to those sections that they were to perform as defined by the scope, and the terms and conditions were in that bid package, which we did not submit to the District Court because it's very, very voluminous.

JUDGE 1: Now, wait a second. You didn't submit the contract?

MR. MOELMANN: Okay. That would define the scope of the contract.

JUDGE 1: Yeah, what is your—where is your contract with Merit—I mean with Roberts & Schaefer, where is the contract, what you think is the contract that excludes this purchase order number 9331-711.

MR. MOELMANN: Okay. The contract would be the oral acceptance of the bid. Merit submitted a bid saying [14] that they would perform this work for 1,775, —

JUDGE 1: Where is that, where's the bid?

MR. MOELMANN: Okay. I—that was just referred to in the affidavit.

JUDGE 1: Where is it?

MR. MOELMANN: It was not submitted to the District Court.

JUDGE 1: So in other words, as far as you're—as far as you're concerned, you—they think the—your opponent, Roberts & Schaefer, they think the contract is this purchase order. You think the contract is something else, but you haven't given us what you think the contract is, which leaves us spinning in a void.

MR. MOELMANN: Yeah, it's an oral agreement.

JUDGE 1: Oh, it's just an oral contract?

JUDGE 3: Or a contract of this amount?

MR. MOELMANN: This is pursuant to Illinois law. We cited the B & C Electric versus Tulzma (phonetic) case that says that when a subcontractor issues a bid on a project and that bid is accepted orally, then a contract is formed.

JUDGE 1: Okay. What are—what are the terms?

MR. MOELMANN: Okay. The terms and conditions would be specified in the bid package that was submitted. [15] This voluminous bid package—

JUDGE 1: What bid package, your bid package or the owner's bid package?

MR. MOELMANN: Well, the bid package that was prepared by the owner and passed to us by Roberts & Schaefer.

JUDGE 1: And that's where we'd find terms about insurance and liability and terms of payment and force majeure and all this stuff?

MR. MOELMANN: Yes. Many times the—

JUDGE 1: And it's not in the record?

MR. MOELMANN: That is not in the record.

JUDGE 2: Where does the clause about the Circuit Court of Cook County come from?

MR. MOELMANN: I'm sorry?

JUDGE 2: Where does the clause about the Circuit Court of Cook County come from?

MR. MOELANN: Okay. If I can explain the chronology, please, is that in May of 1993, this bid package was submitted to Merit. They prepared a bid and submitted their bid at the end of August of 1993.

On August 27th of 1993, Roberts & Schaefer accepted the bid. They then, Merit, started work September 1st, within a few days after that bid was [16] accepted.

On September 7th, Roberts & Schaefer writes a letter back confirming the fact that they accepted the bid and say—and confirms the price of $1,775,000, and Merit proceeded to work. They knew what—exactly what they were supposed to be doing. They knew what—exactly what they were supposed to be doing. That's defined in this voluminous bid package.

JUDGE 1: Look, I can't take your voluminous bid package seriously because it's not in the record. Now, for example, suppose that voluminous bid package contained a forum selection clause, Court of Common Pleas in Pennsylvania. Then, of course, you'd have a very powerful argument; that you had submitted this bid package, included your own forum selection clause, they accepted it.

Then they sent you a variant package a few weeks later, and then you get into all sorts of disputes over how the Uniform—or UCC or how contract law resolves it, but as far as we know, your bid package is not on the record, contain nothing of anything, any terms.

MR. MOELMANN: Our position is is that all that was necessary to present—

JUDGE 1: Yes, I know, so forget the bid package. [17] Your position is that if they say, we want you to do the following work as described in this request for bids

from the owner, you know, digging holes, what have you, and you say, we'll do it for a million dollars, and they say, fine, then you think that's a contract, even though it doesn't have any terms about it, as I say, you know, the usual terms about insurance and excuses and, you know, variants, changes and payment schedule and clearing mechanics' liens and all that stuff.

You think—you think it just doesn't matter, doesn't matter, you have a contract, doesn't matter you don't have any terms except a price. That seems pretty implausible.

MR. MOELMANN: Okay. Your Honor, we were faced with a jurisdictional issue. We felt that what was important—

JUDGE 1: No, it's not—look, you can call it a jurisdiction. What you say—the question is is the contract this naked oral agreement which you claim that has no terms except the price and the work, nothing about contingencies of any sort, or is the contract the contract formed, the contract contained in this purhase order based on the prior dealings of the parties and so forth. That's the question.

[18] That's a pure question of contract law, and I just don't see if this isn't the contract, I don't see how you and your opponent are ever going to resolve or how a Court is going to resolve the substantive dispute you have because there isn't any contract that the Court would be able to look to under your view.

JUDGE 3: We have to just remand it back to the Illinois Court and have the Court order that contract presented?

MR. MOELMANN: No.

JUDGE 3: Tell us how you're going to—how you're going to resolve it as Judge Bozeran. (phonetic)

MR. MOELMANN: If I can just pursue this, is that we had this bid package. We submitted a bid. It was accepted. We started working. On September 7th, Roberts & Schaefer writes a letter confirming the fact they accepted our bid for $1,775,000.

JUDGE 1: Then saying, you know, the papers will be sent to you in due course or something of that sort.

MR. MOELMANN: Right.

JUDGE 1: Which you paid no attention to.

MR. MOELMANN: Purchase order documents.

JUDGE 1: Right, even though, of course, you dealt wtih them before with the Emerald job, you knew they [19] have this elaborate purchase order with a million clauses including the forum selection clause, which you were happy to accede to on the previous job.

MR. MOELMANN: Okay. We continued to do their work—

JUDGE 1: So you thought when they accepted your bid that they were making a contract with you that didn't have any terms except the price.

MR. MOELMANN: And the scope of the work that had to be done.

JUDGE 1: Yes, but didn't have anything about insurance, didn't have anything about changes, didn't have anything about payment schedules, about security, about force majeure, about impossibility, about anything else that you expect to find in any nontrivial contract.

MR. MOELLMANN: Many times that is not necessary.

JUDGE 1: It's not necessary? It's necessary if you have a dispute.

MR. MOELMANN: Depends on what the dispute might be.

JUDGE 3: Many times that's true, but this time it happens to be.

MR. MOELMANN: Okay. As far as the—on November 1st, they issue a purchase order document that was not signed, although that does refer to the bid package, [20] okay. In addition to the purchase order document, which is a one-page document, they then also submit a voluminous package of General Notes and Conditions.

JUDGE 1: It's not one page. That voluminous package is part of the purchase order.

MR. MOELMANN: The District Court found that it was not.

JUDGE 1: There's an appendix to it. It isn't, look at it. You've got page one, which has the description of the work, and page two says the scope of the work, and it keeps going page after page. It's not one page.

MR. MOELMANN: Which pages are you referring to? I'm not certain.

JUDGE 1: Well, you tell—I'm looking at the purchase order.

MR. MOELMANN: Okay. But that does not contain—

JUDGE 1: You told me it's one page, and then it's got stuff attached to it. It's not.

MR. MOELMANN: And it goes up to page seven, okay.

JUDGE 1: Seven pages—

MR. MOELMANN: Seven pages.

JUDGE—you're saying, not one page.

MR. MOELMANN: But that is not—that makes no reference to these General Notes and Conditions.

[21] JUDGE 2: Where was the Circuit Court of Cook County first brought up?

MR. MOELMANN: I'm sorry?

JUDGE 2: When was the Circuit Court of Cook County first brought up to you people?

MR. MOELMANN: You mean this issue about the forum selection clause?

JUDGE 2: Yes.

MR. MOELMANN: Okay. When the suit was filed, it was the first time they were aware of the fact that these other documents that were objected to by our client and never signed—

JUDGE 1: They were never objected—you never made an objection to it, not when you receive—not upon receipt of it.

MR. MOELMANN: We refused to sign them.

JUDGE 1: That's not an objection.

MR. MOLEMANN: I think that a refusal to sign documents—

JUDGE 1: What do you mean refusal? You didn't sign.

JUDGE 3: And then you continued to perform.

MR. MOELMANN: Yes, —

JUDGE 3: Doesn't that waive it?

[22] JUDGE 1: You cashed their checks.

JUDGE 3: You took all—

MR. MOELMANN: We cashed the checks before they were even tendered to us.

JUDGE 3: What?

MR. MOELMANN: We had cashed that first check before they even tendered that document to us.

JUDGE 3: But then you continued to cash the checks, didn't you?

MR. MOELMANN: Yes, because we believed that we had a contract.

JUDGE 1: But the checks said on them or the invoices referred to the purchase order.

MR. MOELMANN: Okay. The point we made, there's a difference between a reference to a purchase order and a purchase order number. Roberts & Schaefer assigned this project a number, like most contractors do, and starting back in August and November—September, there were references to a job number.

JUDGE 1: I mean, you can argue that, that's obviously ambiguous, but I still don't understand. If you win this case, and then they have to bring their suit in Pennsylvania, how is the Pennsylvania Court going to resolve the dispute between you if this [23] purchase order isn't the contract?

MR. MOELMANN: Okay. At that time—

JUDGE 1: What are you going to look at?

MR. MOELMANN: —when it becomes necessary to define what is included in the terms of the contract, these bid documents will be submitted. What was important, and this is the finding by the District Court, —

JUDGE 1: Do the bid documents contain a forum selection clause?

MR. MOELMANN: I'm sorry?

JUDGE 1: Do the bid documents contain—

MR. MOELMANN: They do not.

JUDGE 1: Counsel, what is the significance of the entire agreement clause in the purchase order? Didn't it put—didn't it put you on notice that the purchase order and not any prior understandings provide the entire contract?

MR. MOELMANN: Okay. We believed that the contract was the acceptance of the bid and that the scope—

JUDGE 3: Doesn't the purchase order say, this is the entire agreement, isn't that language in it?

MR. MOELMANN: I'm not certain if you're referring to a certain provision. Of this purchase order that was [24] first tendered to us on November 1st, okay, if that's the case, then you're talking about a seven-page document that the District Court found does not include these General Notes and Conditions because there's no tie-in between this document that they say is a purchase order and the General Notes and Conditions. This is something entirely separate.

The District Court made that finding, and what I'd like to make the point is is that we submitted a supplemental authority by the First Circuit that findings by the District Court should not be set aside unless clearly erroneous. This is the Valadon-Martinez (phonetic) case that we had just cited.

The District Court went through these documents and found that the most important finding is is that this forum selection clause was not part of the contract. That was the only issue that really had to be decided by the District Court.

The District Court went on and found and said it didn't have to concern itself at this time as to what were the provisions of the contract.

JUDGE 1: But you see, what was in your bid package is highly material, and the Judge may not have realized, in this bid package is highly material to whether these [25] General Terms and Conditions are the contract because if the bid package contains its own General Terms and Conditions, then you have a strong case.

If it doesn't have any terms and conditions dealing with the multiple contingencies that can arise in the contract performance, that strengthens their case.

MR. MOELMANN: Okay. If I can try just to respond.

JUDGE 1: Yeah, sure.

MR. MOELMANN: We've pointed out that the Plaintiff, not the Defendant, has the burden of proving what is the contract. We never considered that to be our burden.

We said that by affidavit that this forum selection clause was not part of the contract, was not part of the bid documents.

JUDGE 3: Is it in the purchase order?

MR. MOELMANN: I'm sorry?

JUDGE 3: Is it in the purchase order?

MR. MOELMANN: It—the purchase order, which is the seven-page document, does not make reference to the General Notes and Conditions, it is not.

JUDGE 3: There isn't anything in the purchase order regarding forum selection, any document that you have?

MR. MOELMANN: The back side of the purchase order [26] says that Pennsylvania law will control, okay. That is the only thing about selection of law or forum, which is contrary to what they're saying, that Illinois law shall control, okay.

In order to summarize here, is that the District Court went through these findings and found that the contract consisted of this oral contract that was made in August of 1920—August 27th.

It did not concern itself further as to all the—what were the terms and conditions. They said that would be for another day, but it did make the finding that the forum selection clause was not part of that contract and that one prior—one prior instance is not sufficient to establish a course of dealing.

JUDGE 1: Okay. Thank you, Mr. Moelmann.

MR. MOELMANN: Thank you.

JUDGE 1: Ms. Johnson.

MS. JOHNSON: Your Honor, the District Court was clearly wrong. If the contract was an oral contract, as my opponent suggests, why would they have engaged in further discussion in October up into November about the scope of work? It wouldn't have been necessary.

Why on November 11th would Roberts & Schaefer have enclosed the revised pages two, five and six, which [27] were revised to reflect the points which they discussed on November 4th, 1994. If the contract was merely the oral contract, this wouldn't have been necessary, but—

JUDGE 3: Well, couldn't that have been—

MS. JOHNSON: —yet they sat down and did it.

JUDGE 3: Couldn't that have been alterations in the oral contract?

MS. JOHNSON: It was.

JUDGE 3: That they wanted to confirm in writing.

MS. JOHNSON: When the purchase order documents were sent to Merit on—at or about November 1st, that's the date of the document, there was a scope of work attached to it as well as all of these terms and conditions.

Merit is not heard to say they never received this. Nowhere in their pleadings, nowhere in their affidavit do they say this was not a part of that document.

They had plenty of time to object to anything in here if they wanted to.

JUDGE 3: Is there any document that you say that they received that referred to the Illinois Courts being the forum to resolve any disputes?

MS. JOHNSON: The November 1st purchase order which contained the terms and conditions, yes, that was sent [28] to them.

JUDGE 3: What does it say? Can you—can you read it aloud, please.

MS. JOHNSON: It's Section 6.14, and it says: Law Governing, this purchase order and all disputes between the parties hereto shall be governed by and construed according to the laws of Illinois whose Circuit Courts shall have exclusive jurisdiction to determine all issues.

JUDGE 3: And they—and they received that document?

MS. JOHNSON: Yes, and they're not heard to say they never did. They had all the way up until 1994 when they performed additional work pursuant to additional purchase orders with—which referenced these terms to object.

They could have objected to the insurance, they could have objected to the forum selection clause, they could have objected to patent copyright and trademark infringement.

JUDGE 2: Did Judge Bucklo explain why she didn't pay any attention to that?

MS. JOHNSON: Your Honor, quite frankly, we're at a loss. We don't think she did, and we don't know why. [29] We just think that perhaps she was somewhat confused, and I must admit, these documents do not contain a number 9331-711.

Perhaps the lower Court felt that this ended at page eight, however, Merit doesn't say they never received it. They were well aware of these terms and conditions by view of the prior job.

Merit is a general contractor. Nobody will enter into a construction contract for this amount of money and

not have things about patent and trademark infringement, insurance, waivers of lien, any of that kind of thing. It's just appalling to think that they would, and that's for Merit's protection as well as Roberts & Schaefer's really.

So our point is is that if Merit is saying that this was an oral contract and these terms and conditions were never part of it, they could have said in their briefs below, hey, we never got this stuff, we really never agreed to it because we never saw it, but yet they never say that.

Change orders were issued. Where do the change orders come from. The change orders come from the terms and conditions. That's where it's at.

I also refer you again to the Amelco case, [30] which discusses an affidavit very similar to here. The Amelco case found that the affidavit submitted in support there was conclusory and found that the contractor had accepted the terms and conditions based on its performance before and after receipt of the documents, and we submit the same holds true here.

JUDGE 1: Okay. Thank you, Ms. Johnson.

MS. JOHNSON: Thank you, Judge.

JUDGE 1: Thank you to both counsel. The case will be taken under advisement.

[Filed Oct. 27, 1995]

APPEAL TO THE SEVENTH CIRCUIT COURT OF APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 95 C 0217

ROBERTS & SCHAEFER COMPANY,
A Delaware corporation,
Plaintiff-Appellant,

v.

MERIT CONTRACTING, INC.,
a Pennsylvania corporation,
Defendant-Appellee.

NOTICE OF APPEAL

Notice is hereby given that ROBERTS & SCHAEFER COMPANY (Roberts & Schaefer), Plaintiff-Appellant in the above-named case, by and through its attorneys, Bollinger, Ruberry & Garvey, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the judgment order of September 29, 1995 by the United States District Court for the Northern District of Illinois, Eastern District.

In particular, Roberts & Schaefer River appeals the September 29, 1995 Order and Opinion of the Honorable Elaine Bucklo, declaring that the District Court lacked personal jurisdiction over Defendant-Appellee Merit Contracting, Inc., and that Plaintiff-Appellee failed to produce evidence that would support its complaint for relief.

In the Seventh Circuit Court of Appeals, Plaintiff-Appellant Roberts & Schaefer shall pray that the aforesaid September 29, 1995 Order granting dismissal be reversed. In addition, Roberts & Schaefer shall pray that Judge Bucklo's denial of remand, in the same Order of September 29, 1995, be reversed, and the cause remanded to the state court for further proceedings.

Respectfully submitted,

ROBERTS & SCHAEFER COMPANY

By /s/ Robert J. Franco
One of its Attorneys

[Filed Feb. 13, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 95 C 0217
Judge Bucklo
Magistrate Judge Pallmeyer

ROBERTS & SCHAEFER COMPANY,
A Delaware corporation,
Plaintiff,

v.

MERIT CONTRACTING, INC.,
a Pennsylvania corporation,
Defendant.

MOTION TO REMAND TO
THE CIRCUIT COURT OF COOK COUNTY

NOW COMES the Plaintiff, ROBERTS & SCHAEFER COMPANY ("Roberts & Schaefer"), by and through its attorneys Bollinger, Ruberry & Garvey, and moves this honorable Court to remand this cause to the Circuit Court of Cook County. In support thereof, Roberts & Schaefer will file a Memorandum of Law in support of its Motion to Remand, and in opposition to Dismiss, Transfer or Stay these proceedings filed by Merit Contracting, Inc. ("Merit") pursuant to this Court's Order of January 31, 1995.

1. That the entirety of the present dispute relates to the enforceability of the forum selection clause in the

Roberts & Schaefer—Merit Purchase Order. The General Notes and Conditions ("General Conditions") of the Purchase Order, § 6.14 holds that disputes are to be decided under Illinois law, and that there is exclusive jurisdiction in the Circuit Courts of Illinois. Accordingly, Merit has consented to jurisdiction in Illinois, and has contractually agreed that the Circuit Courts of Illinois, not this Court, have exclusive jurisdiction.

2. That Merit has taken the apparent position that it "refused to sign these documents [the Purchase Order] because the terms did not represent the agreement and were unacceptable to Merit." Merit's Memorandum, at 4. *Accord,* Merit Memorandum, at 5. While Merit ignores the Purchase Order and the forum selection clause, the apparent position taken by Merit is that it did not sign the Purchase Order, and therefore is not bound by the terms of the forum selection clause. However, Merit fails to attach any exhibits or provide any affidavits citing to its purported objection to the General Conditions. Merit's position on this point is simple rhetoric, completely unsupported by any facts.

3. That there existed a valid, enforceable and binding Contract between Merit and Roberts & Schaefer which incorporated the terms of the Purchase Order. In the alternative, Roberts & Schaefer contends that Merit has waived, or is estopped from attacking the validity and enforceability of the Purchase Order.

The Relationship Between Merit and Roberts & Schaefer

4. That in early 1993, Roberts & Schaefer engaged in a series of discussions with Eighty-Four Mining Company ("84 Mine") and Merit relating to the project at issue. On or about May 19, 1993, Roberts & Schaefer received a Request for Quotation from 84 Mine.

5. That on August 3, 1993, Joseph Kikla of Merit wrote to Roberts & Schaefer, advising that Merit's starting

date would be based upon the date the Roberts & Schaefer Purchase Order is received. (Exhibit "A," at 165). Clearly, in August of 1993, Merit was aware that the Purchase Order provided the framework for the Agreement.

6. Thereafter, on September 7, 1993, Roberts & Schaefer directed a copy of the Purchase Order to Merit, (Exhibit "A," at 164). Merit made clarifications, and on November 11, 1993, Roberts & Schaefer provided Merit with a revised Purchase Order incorporating Merit's requested changes. (Exhibit "A," at 163). The Record shows that rather than objecting to the Roberts & Schaefer Purchase Order, Merit made clarifications, those changes were reflected in the Purchase Order, and the final, integrated document was directed to Merit. Merit thereafter constructed the project according to the terms in the Purchase Order and received substantial monies in consideration.

Change Orders

7. That in any construction project, there are changes to the work which generally involve additional work beyond the "scope of the work" specified in the contract, and therefore involve the payment of additional monies. In bidding construction work, a contractor bases its price on the "scope of the work." If the "scope" changes, the contractor is entitled to a change in its price. In this regard, a "change order" is nothing more than an amendment or modification of the Contract. As stated, the present claim is based upon change orders for purported delay damages and acceleration due to inclement weather and untimely material deliveries. While Merit claims that there is no Contract, it seeks to enforce the amendments to the Contract, which give rise to its claim. Arguing on one hand that the Contract is nonexistent, while arguing on the other hand that the contract modifications are valid, is duplicitous and absurd.

8. That there were a series of change orders issued to Merit, all of which reflected changes in Roberts & Schaefer

Purchase Order No. 9331-711. (*See*, Exhibit "A," at 24-31). Merit had requested these modifications to the Contract, and was never heard to object.

9. That on December 16, 1993, Merit's president wrote to Roberts & Schaefer, advising that he needed more time to complete the work, due to inclement weather. The schedule is set forth by the Purchase Order, meaning that Merit's president was seeking an extension of the contract completion date. (Exhibit "A," at 169). Later, on January 12, 1994, Mr. McCracken, the Vice President of Merit also wrote to Roberts & Schaefer stating that the late delivery of materials delayed the construction schedule. (Exhibit "A," at 166-67). As deadlines and extensions of time arise solely from the Contract, Merit would not have made these requests had it not believed that the Purchase Order formed the basis for its Contract with Roberts & Schaefer.

10. The Purchase Order was written on a "lump sum" basis. Accordingly, anything within the "scope of the work" as defined by the Purchase Order, would not give rise to additional compensation. The "scope of the work" therefore, became an important consideration to determine what work was within the scope of the work and therefore subject to the lump sum price, and what work was not within the scope of the work, and therefore was subject to additional compensation by way of a change order. (Exhibit "A", at 41-2, 43-4, 45-6, 47, 48-9, 51, 143 and 144). In fact, there is correspondence which refers to specifications and particular provisions within the Purchase Order. *See*, Letter to Merit's project manager from Roberts & Schaefer of November 17, 1993; Letter to Merit dated November 11, 1993 relating to the contract concrete volume and liquidated damages. (Exhibit "A", at 52, 53). If the Purchase Order were not a part of the Contract, then clearly the parties would not have focused on particular paragraphs. Too, the letter

from a Senior Vice President of Merit to Roberts & Schaefer dated January 12, 1994, makes it clear that the scope of the work was negotiated between Merit and Roberts & Schaefer, and stood as part of the Agreement. In the words of a Merit officer:

> It will take approximately three times as long to construct this conveyor. Additional costs will be incurred and an additional 10 days will be required to complete the assembly of this conveyor.
>
> This is one of the several items that will be constructed outside of Merit's "Scope of Work" as negotiated with Roberts & Schaefer Company. This item, along with the others, need to be discussed in detail.

(Exhibit "A", at 69). In addition, there are many other documents which discuss the scope of the work. (*See, e.g.*, Exhibit "A", at 70, 71 and 84). In this correspondence, there is no negotiation as to the scope of the work. Rather, the discourse relates to how the scope of the work is to be defined and interpreted. As the scope of the work is at the heart of the Purchase Order, this correspondence clearly manifests Merit's recognition that there was an executed Purchase Order between the parties.

11. That on January 12, 1994, Merit's Senior Vice President wrote to Roberts & Schaefer regarding additional money, stating that the "scope of the work" had changed. The "scope" is set forth by the contract. (Exhibit "A," at 168). Again, as the "scope of the work" arises from the Purchase Order, these letters manifest Merit's belief that it had executed a valid Contract with Roberts & Schaefer.

Delay Penalty

12. That nearly all construction contracts have penalty provisions, commonly referred to as "liquidated damages" provisions. The Roberts & Schaefer-Merit contract is no different. On this project, there were construction delays due to inclement weather, giving rise to delays which

affected the liquidated damages provision. By letter dated January 27, 1994, Merit's president wrote Roberts & Schaefer requesting that he sign an agreement, limiting Merit's contribution to 8% of the penalty owed to 84 Mine. (Exhibit "A," at 176-77). In response, Paul King of Roberts & Schaefer send a revised agreement to Merit's president, assigning 16% of the penalty to Merit. (Exhibit "A," at 174-75). Merit's president signed the 16% agreement, and then reneged on his agreement and withdrew his assent. With respect to the Agreement which Merit reneged, Merit's consent to incorporate the General Conditions is set forth as follows:

* * * *

GENERAL CONDITIONS

a. All additional General Conditions including supervision, etc., required due to this accelerated and extended schedule inclusive of overtime, will be charged by Merit to R&S.

* * * *

(Exhibit "A," at 174). The modification, to the Contract which was ultimately executed, is identical:

GENERAL CONDITIONS

a. All additional General Conditions including supervision, etc., required due to this accelerated and extended schedule inclusive of overtime, will be charged by Merit to R&S.

* * * *

(Exhibit "A," at 172). As shown by the accompanying FAX cover sheet, Clem Gigiotti, the president of Merit, drafted the last such provision and directed it to Roberts & Schaefer for execution. (Exhibit "A," at 171). It is this modification, relating to extra work, which frames the present dispute. For Merit to contend that the forum selection clause does not apply, when it was incorporated into the Agreement by Merit's own president, is outrageous.

Purchase Orders

13. During the construction activities at 84 Mine, there was a great amount of correspondence and construction documentation exchanged between the parties. In the Merit invoices, Merit specified the Roberts & Schaefer Purchase Order number and Merit's Contract number, evidencing Merit's assent that a contract was in force and effect. In fact, the two March 8, 1994 Merit invoices and the invoices of February 21, 1994, the two invoices of February 22, 1994, the invoices of February 25, 1994 and the two invoices of March 2, 1994 reflect the word "contract" manifesting Merit's belief that a valid and enforceable Contract existed between the parties. (Exhibit "A", at 8, 9, 10, 11, 12, 13, 14, 32, 33, 34, 37, 38, 67, 68 and 142). In short, Merit submitted invoices against the Purchase Order, was paid under that Purchase Order, and now contends that it was not subject to that Purchase Order. Of particular significance is the February 28, 1994 invoice which reflects the "original contract price," the change orders or amendments to the Contract, and the "revised contract price." (Exhibit "A", at 72). The same holds true for the invoices of January 31, 1994, December 31, 1993, November 24, 1993, February 28, 1994, March 28, 1994, and April 28, 1994 (Exhibit "A", at 16, 17, 61, 63, 64 and 66) which also reflect the "original contract price," the "revised contract price" and the change orders.

Later Work

14. That in late 1994, there was additional work performed by Merit for Roberts & Schaefer at 84 Mine. The Purchase Orders, directed to Ronald McCracken, the vice president of Merit, reflect that the "Terms and conditions shown on Roberts & Schaefer P.O. #9331-711 will apply." At no time did Merit advise Roberts & Schaefer that there was no such contract in existence. Rather, Merit completed the work, invoiced Roberts & Schaefer under the Purchase Order, and was paid under the Roberts

& Schaefer Purchase Order. (Exhibit "A", at 19, October 3, 1994; September 30, 1994, at 20; p. 84; October 7, 1994, at 21; October 4, 1994, at 22; October 12, 1994, at 23).

Communications to Merit

15. That over the course of the construction project, there were communications between the parties which reflected that the Purchase Order stood as part of the Contract between Merit and Roberts & Schaefer. For example, on July 6, 1994, Roberts & Schaefer wrote to Merit regarding a billing discrepancy, and referred to the Purchase Order which sets forth the amount of "mark up" Merit could charge on its invoices. (Exhibit "A", at 39). Moreover, this correspondence reflects not only the Purchase Order number, but also refers to billing practices, which could only arise from the Contract. (Exhibit "A", at 40, 41 and 44).

16. In addition, there is correspondence from Merit to Roberts & Schaefer manifesting its assent that the Purchase Order was in force and effect. For example, on November 15, 1993, Merit wrote Roberts & Schaefer advising of a receivable, referring to the Merit contract number, and referencing the contract price. (Exhibit "A", at 57).

Issues of Delay

17. That with any construction contract, there are deadlines setting forth when the work must be completed. Here, the documents are replete with Merit contending that inclement weather had delayed its work. (*See e.g.*, Exhibit "A", at 72, 75-76, 78-80, 81-2). Without a contractually imposed schedule, there would be no need for such correspondence. Moreover, on October 12, 1993, Merit wrote to Roberts & Schaefer advising of a " '*force majeure*' *situation.*" If there was no Contract, this would not be an issue, and there would be no need for such a notification. (Exhibit "A", at 73). *See*, General Conditions, § 6.8 at 20 (relating to *force majeure* extending the Contract deadline).

Conclusion

18. That the foregoing clearly manifests that there exists a valid and enforceable Contract between the parties, and that Merit understood that the terms of the Purchase Order controlled the work. Accordingly, Merit has consented to exclusive jurisdiction in the Circuit Courts of Illinois and has waived or is estopped from attacking the jurisdiction of the Illinois state court. Moreover, Merit's consent moots and defeats its motion to transfer, stay or dismiss this cause. Further, as Merit has refused to negotiate the resolution fo this matter thereby holding the retainage of Roberts & Schaefer hostage, there exists adequate reasons for this Court to adjudicate and declare the rights, burdens and duties of the parties.

WHEREFORE, the Plaintiff, Roberts & Schaefer Company prays this honorable Court to remand this action to the Circuit Court of Cook County, together with the following relief:

a. Find that the Purchase Order was part of the Contract between Merit and Roberts & Schaefer,

b. Find that Merit consented to exclusive jurisdiction in the Circuit Courts of Illinois,

c. Find that the consent of Merit to exclusive jurisdiction in the Circuit Courts of Illinois moots Merit's motion,

d. Find that there exists an adequate basis for declaratory relief, and

e. Enter all other just and equitable relief.

Respectfully submitted,

By /s/ Robert J. Franco
One of its Attorneys
ROBERTS & SCHAEFER COMPANY

[Filed Jan. 20, 1995]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 95 C 0217
Judge Bucklo

ROBERTS & SCHAEFER COMPANY,
a Delaware corporation,
Plaintiff,

vs.

MERIT CONTRACTING, INC.,
a Pennsylvania corporation,
Defendant.

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO TRANSFER OR STAY THESE PROCEEDINGS

Now comes the Defendant, Merit Contracting, Inc., by its attorney, LAWRENCE R. MOELMANN, and for its Motion To Dismiss or, in the Alternative, to Transfer or Stay these Proceedings, states as follows:

1. Merit moves that this matter be dismissed for lack of personal jurisdiction pursuant to the provisions of Rule 12(b)(2) of the Federal Rules of Civil Procedure.

2. Merit also moves that this matter be dismissed because of another matter pending in the Commonwealth of Pennsylvania and because this Court should decline jurisdiction under the Federal Declaratory Judgment Act, 28 USC § 2201.

3. Alternatively, that venue should be transferred to the United States District Court for the Western District

of Pennsylvania, pursuant to the provisions of 28 USC § 1401(a).

4. Alternatively, that these provisions be stayed pending resolution of the issues pending between these same parties in a matter captioned, "Merit Contracting, Inc. v. Roberts & Schaefer Company" which is pending as Case No. 94-6688 in the Court of Common Pleas of Washington County, Pennsylvania, in accordance with the Colorado River Doctrine, as enunciated by the Supreme Court in 424 U.S. 800.

5. In support of this Motion, Merit is filing herewith its Memorandum in Support of the Defendant's Motion to Dismiss or, in the Alternative, to Transfer or Stay these Proceedings.

WHEREFORE, Merit Contracting, Inc., moves that this Court dismiss these proceedings or, in the alternative, transfer or stay these proceedings, for the reasons stated in this Motion and stated in its supporting Memorandum.

MERIT CONTRACTING, INC.

By /s/ Lawrence R. Moelmann
One of Its Attorneys

[Filed Jan. 20, 1995]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 95 C 0217
Judge Bucklo

ROBERTS & SCHAEFER COMPANY,
a Delaware corporation,
Plaintiff,

vs.

MERIT CONTRACTING, INC.,
a Pennsylvania corporation,
Defendant.

MEMORANDUM IN SUPPORT OF THE DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO TRANSFER OR STAY THESE PROCEEDINGS

Now comes the Defendant, MERIT Contracting, Inc. ("MERIT") by its attorney, LAWRENCE R. MOELMANN, and files this Memorandum in Support of the Defendant's Motion to Dismiss or, in the Alternative, to Transfer or Stay these Proceedings.

I. NATURE OF MOTION

MERIT has filed a Motion in this action seeking the following relief:

(1) Dismissal for lack of personal jurisdiction;

(2) Dismissal based on a previously pending lawsuit in the Commonwealth of Pennsylvania and re-

questing that this Court decline jurisdiction under the Declaratory Judgment Act;

(3) Transfer to the United States District Court for the Western District of Pennsylvania pursuant to 28 USC § 1404(a) and upon forum non-conveniens grounds, if dismissal is not granted; and

(4) Stay of the proceedings pending final resolution of the Pennsylvania action, if the case is not dismissed or transferred.

As will be shown in this Memorandum, the Defendant conducts no business in Illinois. The "minimum contracts" requirement is not satisfied in order to subject MERIT to the jurisdiction of the Illinois Courts. This suit involves a construction project at a coal mining facility in Pennsylvania, and nothing relating to this dispute occurred in Illinois. Additionally, MERIT commenced a suit in the Pennsylvania state court against the plaintiff herein, Roberts & Schaefer Company ("R&S"), with respect to this dispute. The Pennsylvania proceedings were commenced before the Illinois proceedings. At the outset, therefore, it is appropriate for this Court to determine the various jurisdictional issues raised in the pending Motion.

In support of this Motion, MERIT submits the Affidavit of its president, Clement P. Gigliotti, which is attached hereto as Exhibit "A" (the "Gigliotti Affidavit"). This Affidavit and the pleadings establish the following facts.

II. STATEMENT OF FACTS

MERIT is a Pennsylvania corporation, with its principal place of business in Monongahela, Pennsylvania. MERIT engages in general construction work and undertakes projects primarily in Pennsylvania, although it has worked on some projects in Ohio, West Virginia and Maryland. MERIT has never engaged in or solicited business in Illinois, nor does it own real or personal prop-

erty in this state. At all relevant times, R&S maintained an office located in Monroeville, Pennsylvania. MERIT dealt with R&S exclusively through its Pennsylavnia office with respect to the project which is the subject of this lawsuit.

On or about May 25, 1993, R&S asked MERIT to submit a bid to perform certain construction services at a raw coal storage and handling facility located in Washington County, Pennsylavnia (the "Facility"). In accordance with the solicitation, MERIT submitted a bid to R&S to perform concrete and structural steel work, miscellaneous equipment, erection, electrical and demolition work at the Facility, which bid was accepted by R&S. R&S directed MERIT to proceed with the work, and MERIT commenced work on or about September 1, 1993. Pursuant to the original schedule, the project was to be completed on or about December 31, 1993, with shake down, start up and miscellaneous punch list items to be completed thereafter.

After commencing work, MERIT invoiced R&S in the amount of $154,620.00 for services rendered on or about September 13, 1993. The invoice (Exhibit 1 to the Gigliotti Affidavit) was submitted to R&S's offices in Pennsylvania. On October 25, 1993, R&S paid this invoice by check in the amount of $154,620.00 (Exhibit 2 to the Gigliotti Affidavit) from its Pennsylvania office. Thereafter on November 1, 1993, more than half way into the project, R&S first tendered to MERIT documents purporting to be a purchase order and other contract documents, which documents are attached as exhibits to the R&S Complaint. A copy of the R&S Complaint, including exhibits, is attached hereto as Exhibit "B". MERIT refused to sign these documents because the terms did not represent the agreement and were unacceptable to MERIT.

A dispute arose between the parties concerning the scope of work and certain damages related to a delay in

the project. MERIT requested payment from R&S for the extra work and delay expenses, which requests have been refused by R&S.

After attempting to resolve this matter amicably, MERIT commenced a lawsuit in the Court of Common Pleas of Washington County, Pennsylvania at Docket No. 94-6688 on December 27, 1993 by filing a Praecipe for Writ of Summons (Exhibit "C"). Under Pennsylvania law, a party may commence a lawsuit by filing a Praecipe for Writ of Summons or by filing a Complaint. *See*, Pennsylvania Rule of Civil Procedure 1007. MERIT filed a Complaint in the Pennsylvania action on January 13, 1995 (Exhibit "D").

All of the above facts are supported by the Gigliotti Affidavit (Exhibit "A").

On December 28, 1994, R&S filed its Complaint for Declaratory Judgment and Other Relief in the Circuit Court of Cook County, Illinois (Exhibit "B"). This action was removed to federal court on January 12, 1995 pursuant to 28 USC § 1441.

ARGUMENT

I. THIS COURT LACKS PERSONAL JURISDICTION OVER MERIT

It is respectfully submitted that this Court lacks personal jurisdiction over MERIT. MERIT never transacted any business within Illinois, has no personal or real property in Illinois and dealt exclusively with the R&S representatives in Pennsylvania.

The Gigliotti Affidavit establishes that MERIT has never engaged in or solicited business in Illinois; that all contract negotiations took place in Pennsylvania; that the Contract was performed in Pennsylvania; and that all invoices were mailed by MERIT to R&S's offices in Pennsylvania. Mr. Gigliotti further states that several months

after the parties entered into their agreement and MERIT commenced work, R&S submitted what purported to be a purchase order and other contract documents for signature (Exhibits to the R&S Complaint, Exhibit "B"). Mr. Gigliotti never signed these documents submitted by R&S because the terms were unacceptable to MERIT and did not represent the agreement of the parties.

The Illinois Long Arm Statute provides that the courts in this state may exercise jurisdiction over a non-resident defendant provided that such exercise of jurisdiction is not inconsistent with the United States Constitution. *Stuart-James Co., Inc. v. Rossini,* 736 F.Supp. 800 (N.D. Ill. 1990); S.H.A. 735 ILCS 5/2-209. As such, Illinois requires that a defendant have "minimum contacts" or activities within the state of Illinois which "make it reasonable, in the context of Federal system of government, to require . . . [a party] to defend the particular suit which is brought there." *International Shoe Co. v. State of Washington,* 326 U.S. 310, 317 (1945).

The exercise of jurisdiction by this Court over a non-resident defendant that has had no contacts whatsoever with the State of Illinois would offend "traditional notions of fair play and substantial justice". *International Shoe,* 326 U.S. at 316, citing *Milliken v. Meyer,* 311 U.S. 457, 463. It would be extremely prejudicial to MERIT for an Illinois Court to force MERIT to litigate in a forum with which it has had no contacts.

R&S will argue that MERIT consented to jurisdiction by virtue of a forum selection clause located in the documents that R&S submitted to MERIT in November of 1993 (Exhibits to the R&S Complaint, Exhibit "B"). As a preliminary matter, these documents were never accepted by MERIT and do not represent the terms of the agreement between the parties for the reasons previously discussed (Gigliotti Affidavit, ¶ 10). Furthermore, a forum selection clause does not justify the exercise of jurisdiction where the forum is otherwise improper.

Weidner Communications, Inc. v. H.R.H. Prince Bandar Al Faisal, 859 F.2d 1302 (7th Cir. 1988) (Under Illinois law, forum selection clause does not confer jurisdiciton over foreign litigation); *National Hydro Systems v. Summit Constructions, Inc.,* 731 F.Supp. 264 (N.D.Ill. 1989) (Forum selection clause is only one factor to consider and must be weighed in context of other facts of case).

Because Illinois courts lack personal jurisdiction over MERIT, this case should be dismissed as a matter of law. Rule 12(b)(2), *Fed.R.Civ.Pro.*

II. THE COURT SHOULD DECLINE JURISDICTION OVER THIS ACTION FOR DECLARATORY RELIEF

This case is not appropriate for declaratory relief primarily because there is an action pending in Pennsylvania between the same parties (see, Exhibits "C" and "D") and jurisdiction should be denied pursuant to 735 ILCS 5/2-619, as that Statute has been applied by the Seventh Circuit in *Aetna Casualty v. Kerr-McGee Chemical Corp.,* 875 F.2d 1252 (7th Cir. 1989). Jurisdiction under the Federal Declaratory Judgment Act is discretionary. 28 USC § 2201.; *see also, Brillhart v. Excess Insurance Company,* 316 U.S. 491, 494, 62 S.Ct. 1173, 1175 (1941). ("Although the District Court had jurisdiction over the suit under the Federal Declaratory Judgment Act, it was under no compulsion to exercise that jurisdiction"). While the Declaratory Judgment Act gives a court the *power* to make a declaration regarding the rights and other legal relations of any interested party, it does not require that the court exercise such discretion. *See, Yellow Cab Company v. City of Chicago,* 186 F.2d 946 (7th Cir. 1951).

Federal courts are reluctant to take jurisdiction of declaratory judgment actions involving the same state law issues as parallel state proceedings because "it would be

uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties." *Brillhart v. Excess Insurance Company,* 316 U.S. at 495, 62 S.Ct. at 1175-1176. Federal jurisdiction is undesirable in these circumstances because "gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." *Id.*

In *Brillhart,* the Court concluded that when a district court is presented with a declaratory judgment action and a simultaneous state court action, "[the Court] should ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the state court." *Brillhart,* 316 U.S. at 495, 62 S.Ct. at 1176. To assist in this process, the Court enumerated a nonexclusive list of factors a federal district court should consider in deciding whether to exercise jurisdiction in these circumstances. These factors include:

(1) Inquiry into the scope of the pending state court proceeding and the nature of the defenses open there;

(2) Whether the claims of all parties in interest can satisfactorily be adjudicated in the proceeding;

(3) Whether necessary parties have been joined; and

(4) Whether such parties are amenable to process in that proceeding.

Brillhart, 316 U.S. at 495; 62 S.Ct. at 1176.

Applying this analysis to the present case, the scope of the Pennsylvania action (Exhibit "D") is much broader than the present declaratory judgment case (Exhibit "B") because the Pennsylvania action includes breach of con-

tract and other common law claims under Pennsylvania law. Thus, the declaratory judgment action as pleaded by R&S would not resolve all outstanding state law issues between the parties.

As noted, *Brillhart* also holds that the Court should consider whether the case is governed by state or federal law. *Brillhart*, 316 U.S. at 495, 62 S.Ct. at 1176. Since the present case is governed by Pennsylvania state law [1] as to the rights of the parties and the interpretation of the contract, the case is most properly adjudicated by a Pennsylvania court.

In addition to the *Brillhart* factors, the Seventh Circuit has recognized several additional factors that may justify dismissal of a declaratory judgment action when a contemporaneous state court case is pending. The factors a court may consider are the following:

(1) Whether it would serve any useful purpose to decide the declaratory judgment action;

(2) Whether a decision by the federal court would finally determine the rights of the parties;

(3) Whether a decision of the federal court is being sought merely to determine issues which are involved in a case already pending and can properly be disposed of therein; or

(4) Whether there is any other reason that an action can better be adjudicated in another court.

Yellow Cab Company v. City of Chicago, 186 F.2d 946 (1951). It would serve no useful purpose to decide the declaratory judgment action because the decision by this Court would not adjudicate MERIT's breach of contract and other common law claims.

---

[1] The backside of the Purchase Orders (Exhibit 3 to the Gigliotti Affidavit) upon which R&S relies, state that they "shall be construed according to the laws of the State of Pennsylvania".

Subsequent to the *Yellow Cab* decision, the Seventh Circuit revisited this issue in *Aetna Casualty v. Kerr-McGee Chemical Corp.*, 875 F.2d 1252 (7th Cir. 1989). In *Aetna,* an insurer brought a declaratory judgment action against the insured's subsidiaries in federal court. At the same time, the insured brought a lawsuit in Oklahoma state court, which involved the same issues as the federal court litigation. In deciding whether to dismiss the federal court action, the *Aetna* court examined an Illinois Revised Statute, Chapter 110, Section 219, which Statute authorizes dismissal of an action in favor of broader, more dispositive litigation pending in another forum. The *Aetna* court applied Section 2-619(a)(3) of the Illinois Code of Civil Procedure, now 735 ILCS 5/2-619, to its declaratory judgment action and held that, although the case had a legitimate connection with the State of Illinois, the Oklahoma action was the broader, more dispositive litigation. 875 F.2d at 1261. As such, the *Aetna* court upheld the lower court's dismissal of the federal court case. *Id.*

A review of the respective complaints (Exhibits "B" and "D") establishes that the Pennsylvania action is the broader and more dispositive litigation. Additionally, as set forth with more particularity below, practical considerations warrant a dismissal of this case in favor of the Pennsylvania action.

III. IF DISMISSAL IS NOT GRANTED, THIS SUIT SHOULD BE TRANSFERRED TO THE WESTERN DISTRICT OF PENNSYLVANIA PURSUANT TO 28 U.S.C. § 1404(a)

A court has broad discretion to transfer a suit to any jurisdiction where it could otherwise have been brought if to do so would serve the convenience of the parties and the witnesses, or be in the interests of justice. *Coats Co., Inc. v. Vulcan Equipt. Co., Ltd.*, 459 F.Supp. 654 (N.D.Ill. 1978); 28 USC § 1404(a). The moving party

must demonstrate that a transfer is for the convenience of the parties, the witnesses and is in the interests of justice. *Central States, Southeast and Southwest Areas Pension v. Brown,* 587 F.Supp. 1067 (N.D.Ill. 1984); *Midwest Precision Services, Inc. v. PTM Industries Corporation,* 574 F.Supp. 657 (N.D.Ill. 1983). Although the party seeking transfer bears the burden of establishing that transfer of venue is proper, that burden is substantially less than transfer under the doctrine of *forum non conveniens. Norwood v. Kirkpatrick,* 349 U.S. 29, 75 S.Ct. 544, 99 L.Ed. 789 (1955).

As a preliminary matter, venue is proper in the United States District Court for the Western District of Pennsylvania because there is complete diversity of citizenship and the amount in controversy exceeds $50,000.00. Secondly, the private and public factors in this case overwhelmingly support a transfer of this action to the Western District of Pennsylvania. All representatives of MERIT and the project owner, potentially significant witnesses to both parties, are located in Pennsylvania. Naturally, MERIT's employees and agents with the most knowledge on relevant issues including, among others, its on-site personnel, are located in Pennsylvania. Some of the representatives of R&S are located in Pennsylvania and the transactions and occurrences that give rise to the claims asserted by both parties took place in Pennsylvania. At all times relevant to this action, R&S maintained an office in Pennsylvania and it was with the Pennsylvania employees of R&S that MERIT conducted business. Representatives of the owner, engineer, other contractors and material suppliers who were involved with the project and who may have knowledge of relevant facts to this dispute are all located in Pennsylvania. Critical to both parties are documents and witnesses located in Pennsylvania.

All of the necessary witnesses would be outside the jurisdiction of the Court if this suit is not dismissed or transferred to Pennsylvania, and may not be available to

give live testimony in these proceedings. As this District Court has previously stated, "[t]he interest of justice is best served by ensuring the presence of live witness testimony." *Sky Valley Ltd. Partnership v. ATX Sky Valley Ltd.*, 776 F.Supp. 1271, 1277 (N.D.Ill. 1991). Moreover, those who do appear voluntarily will be required to travel great distances, and the expense of obtaining the attendance of all of these witnesses, to the extent their attendance can be obtained, will be far greater if this case remains in Illinois. While it is true that, wherever this litigation goes forward, there may be some witnesses beyond the reach of the court, that would be the case for virtually every material witness if this suit is not dismissed or transferred to the Western District of Pennsylvania.

No fewer than three public interest factors warrant a dismissal or transfer of this suit to the Pennsylvania Action. First, Pennsylvania has a greater interest in resolving a dispute regarding the interpretation of contracts and the payment for services rendered by a corporate citizen of Western Pennsylvania. Second, Pennsylvania has a greater interest in resolving disputes concerning work performed at one of its raw coal storage handling facilities, so that the owner and all of the parties related to the project can move onto the next job having resolved all outstanding matters concerning the Facility.

Third, R&S expressly states in the two (2) Purchase Orders attached to its Complaint, that the law of Pennsylvania shall apply concerning disputes between parties (Exhibit 3 to the Gigliotti Affidavit). As the United States Supreme Court has recognized, it is appropriate to have "the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in a law foreign to itself." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947). While this Court is

well-equipped to decide issues of Pennsylvania law, it is more appropriate to leave that task to the Pennsylvania Courts in light of their greater familiarity with the laws of that jurisdiction. *See, Securities and Exchange Commission v. First National Finance Corp.*, 392 F.Supp. 239 (N.D.Ill. 1975).

After weighing the relevant factors, it is clear that litigation in the present forum is a great inconvenience to the parties and witnesses. Justice is better served by transferring this case to the Western District of Pennsylvania so that the majority of witnesses are available to testify.

IV. IF THIS ACTION IS NOT DISMISSED OR TRANSFERRED, IT SHOULD BE STAYED PENDING FINAL RESOLUTION OF THE PENNSYLVANIA ACTION PURSUANT TO THE COLORADO RIVER DOCTRINE

MERIT respectfully submits that the issuance of a stay would be the least appropriate solution in this matter. Nevertheless, if this Court declines to either dismiss or transfer this matter, this Court should issue a stay of proceedings pending resolution of the Pennsylvania action pursuant to the United States Supreme Court's decision in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed. 2d. 483 (1976). *Colorado River* and its progeny establish a doctrine that permits a court to abstain from the exercise of federal jurisdiction in favor of a pending state court action. Specifically, *Colorado River* identified several principals which govern in situations where there is contemporaneous exercise of jurisdiction by a state and a federal court. The Supreme Court in *Colorado River* stated, in relevant part, as follows:

> In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the

> inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and the order in which jurisdiction was obtained by the concurrent forums. No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against the exercise is required. 424 U.S. at 819, 96 S.Ct. at 1247 (citations omitted).

Applying the factors set forth in *Colorado River* to the present case, it is clear that a stay or abatement of these proceedings would avoid piecemeal litigation and work to the benefit of both parties. As such, in the event this Court is unwilling to dismiss or transfer this case, MERIT respectfully requests a stay of proceedings pending resolution of the Pennsylvania Action.

CONCLUSION

For all of the stated in this Memorandum, MERIT respectfully submits that these proceedings must be dismissed or, in the alternative, be transferred or stayed.

MERIT CONTRACTING, INC.

By: /s/ Lawrence R. Moelmann
One of its Attorneys

[Exhibits A through D omitted]

[Dated Jan. 18, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 95 C 0217
Judge Bucklo

ROBERTS & SCHAEFER COMPANY,
a Delaware Corporation,
Plaintiff,

vs.

MERIT CONTRACTING, INC.,
a Pennsylvania Corporation,
Defendant.

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA)
) ss:
COUNTY OF WASHINGTON)

AND NOW, comes CLEMENT P. GIGLIOTTI, being duly sworn and under oath states that he is competent to testify before this Honorable Court if called as a witness and would testify as follows:

1. I, Clement P. Gigliotti, am the President of Merit Contracting Inc., ("Merit"), the Defendant in this action.

2. Merit engages in general construction, is a Pennsylvania corporation, with its principal place of business in Monongahela Pennsylvania, and does some work in Ohio, West Virginia and Maryland.

3. Merit has never engaged in or solicited business in the State of Illinois and owns no personal or real property in Illinois. At all relevant times the Plaintiff, Roberts & Schaefer Company ("R & S"), maintained an office at 2790 Mosside Boulevard, Monroeville, Pennsylvania, 15146. Merit dealt exclusively with R & S in its Pennsylvania office.

4. On or about May 25, 1993, R & S approached Merit and asked Merit to submit a bid to perform certain construction services at a Raw Coal Storage and Handling Facility located in Somerset Township, Washington County, Pennsylvania.

5. In accordance with the solicitation, Merit submitted a bid to R & S to perform concrete and structural steel work, miscellaneous equipment, erection, electrical and demolition work at the Raw Coal Storage and Handling Facility, which bid was accepted by R & S.

6. R & S asked Merit to proceed with the work and Merit commenced work on or about September 1, 1993.

7. Pursuant to the original schedule, the project was to be completed on or about December 31, 1993, with shake down, start up and miscellaneous punch list items to be completed thereafter.

8. After commencing work, Merit invoiced R & S for services rendered on or about September 30, 1993, which invoice was in the amount of $154,620.00. The invoice was submitted to the R & S office located in Monroeville, Pennsylvania. A true and correct copy of this invoice is attached hereto as Exhibit "1".

9. By check dated October 25, 1993, Merit was paid $154,620.00 pursuant to its invoice. As indicated on the check, this payment was issued by R & S from its office in Monroeville, Pennsylvania. A true and correct copy of the check is attached hereto as Exhibit "2".

10. On or about November 1, 1993, which was more than half way into the project, R&S first tendered to Merit documents purporting to be purchase orders and other documents which are attached to the Complaint filed by R & S as "Exhibit "A". It is important to note, however, that the reverse side of the November 1, 1993 Purchase Order (attached hereto as Exhibit "3") states that Pennsylvania law shall apply to any disputes. No one from Merit signed these documents because the terms were unacceptable and did not represent the parties' agreement.

11. A subsequent dispute arose between the parties concerning the scope of work and regarding certain damages incurred by Merit due to a delay by R & S in supplying materials.

12. Merit has initiated an action in Washington County, Pennsylvania against R & S to recover monies due for extra work and delay damages incurred by Merit.

/s/ Clement P. Gigliotti
CLEMENT P. GIGLIOTTI
President
Merit Contracting, Inc.

avo ROBERTS & SCHAEFER COMPANY
019 09/30/93 9331-711

Gross Amount	Retainage/Disc.	Payment Amount
171,800.00	17,180.00	154,620.00

221000 5804

Check No:	Vendor:				
5804	46	MERIT CONTRACTING INC.	171,800.00	17,180.00	$154,620.00

ROBERTS & SCHAEFER COMPANY
EASTERN OPERATION
790 MOSSIDE BLVD. MONROEVILLE, PA 15146
PH. (412) 373-8020

The First National Bank of Chicago - 0710
Chicago, Illinois
Payable Through FCC National Bank
Wilmington, Delaware
62-28/311
0945463

221000 5804

DATE	NUMBER
10/25/93	5804
AMOUNT	
******$154,620.00**	

PAY ****** One Hundred Fifty Four Thousand Six Hundred Twenty Dollars & no/100 ******

TO THE ORDER OF
MERIT CONTRACTING INC.
600 PARK AVENUE
MONOGAHELA, PA 15063

John E. Flanagan
Barbara A. Prudente
AUTHORIZED SIGNATURE

⑈221000 5804⑈ ⑆031100283⑆ 09 45463⑈

DEPOSIT TICKET 6-12/30

MERIT CONTRACTING, INC.

Integra Bank
INTEGRA BANK/PITTSBURGH
Pleasant Hills - Pittsburgh, PA 15236

DATE

	DOLLARS	CENTS
CURRENCY		
COIN		
CHECKS LIST EACH SEPARATELY R&S #2210005804 154620 00 BAVUSO #16604 2500		

ENTERED OCT 27 1993
ENTERED NOV 12 1993

TOTAL FROM OTHER SIDE OR ATTACHED LIST

PLEASE ENDORSE TOTAL HERE TOTAL 154 6200

Checks and other items are received for deposit subject to the provisions of the Uniform Commercial

DEPOSITS MAY NOT BE AVAILABLE FOR IMMEDIATE WITHDRAWAL

TOTAL DEPOSIT 154 6200

⑆043000122⑆ 00121315 26⑈ 20

EXHIBIT 2

754

MERIT CONTRACTING INC.

600 Park Avenue
Monongahela, PA 15063
Phone: (412) 258-9009
FAX: (412) 258-8025

INVOICE 2019

DATE	September 30, 1993
CUSTOMER ORDER NUMBER	9208-762
PROJECT NAME	84 Mining Company
MERIT JOB NUMBER	93044

TO: Roberts & Schaefer
William Penn Plaza
2790 Mosside Boulevard
Monroeville, PA 15146

Attention: Bill McQue

NET 10 Days: ¼ % after 10 Days - 1½ % after 20 Days

APPLICATION 1

CONTRACT PRICE	COMPLETED TO DATE	AMT INVOICED PREVIOUSLY	EARNED THIS PERIOD	10% RETAINAGE
$1,775,370.00	$171,800.00	$ 0.00	$171,800.00	$17,180.00

Total Amount Due This Invoice $154,620.00

Thank You.

76a

FILE COPY

ROBERTS & SCHAEFER CO.
Eastern Operation
William Penn Plaza
2790 Mosside Blvd.
Monroeville, PA 15146

Phone (412) 373-8020
(412) 373-7065

PURCHASE ORDER NO. 9331-711

Job No. 9331 EIGHTY-FOUR

Date November 1, 1993

PURCHASED FROM:

Merit Contracting, Inc.
600 Park Avenue
Monongahela, PA 15063

Attention: Mr. Clem Gigliotti
258-9009

SHIP TO:

Construction Services Required at
Eighty-Four Mining Co.
Somerset Portal near
Eighty-Four, PA 15330

INSTRUCTIONS: ORDER NUMBERS MUST BE SHOWN ON INVOICES, BILL OF LADING AND SHIPPING TAGS. PREPAID FREIGHT ADDED TO INVOICE MUST BE SUPPORTED BY ORIGINAL FREIGHT BILL OR CHARGES WILL BE DEDUCTED. NO BOXING OR CRATING CHARGES UNLESS SPECIFIED. TRANSPORTATION CHARGES INCLUDING THOSE OF SUBVENDORS SHOULD BE PREPAID AND FREIGHT BILL FORWARDED TO US.

QUANTITY	ITEM	DESCRIPTION	AMOUNT
		RAW COAL STORAGE AND HANDLING FACILITY	
1 LOT	A	Provide all UMWA labor, expendables, tools, machinery, equipment, supervision, certain construction materials, and insurance to execute the work outlined in the job specifications, R&S drawings, and scope of work.	$1,775,000.00
		PRICE BREAKDOWN	
		DEMOLITION, EXCAVATION, FOUNDATIONS, ERECTION . . .	$1,325,000.00
		RECLAIM TUNNEL INC. FURNISH & INSTALL ESCAPE TUBE .	$450,000.00
		TOTAL	$1,775,000.00
		CONFIRMING verbal order of 8-27-93 to Clem Gigliotti from Bill McCue.	
		Cost Code	
		401000 - $. 280,900 — 100% invoiced 401170 - 195,800 — 100% invoiced 401230 - 1,298,300	

Delivery: Per construction schedule

F.O.B.: Jobsite where applicable

Method: N/A

Freight: N/A

Pricing Basis: Phone quote of 8-27-93 from Clem Gigliotti

Bill McCue.

Taxable ☐ Non-Taxable ☒

William R. McCue

William R. McCue P.A

THIS OFFER OR PURCHASE ORDER IS EXPRESSLY MADE CONDITIONAL ON ASSENT BY THE SELLER TO ALL TERMS ON FACE AND BACK HEREOF.

00051

77a

INSTRUCTIONS, TERMS AND CONDITIONS

OF PURCHASE ORDER:

1. Seller represents that the goods covered by this order were not manufactured and are not being sold or priced in violation of any federal, state or local law and further represents that the use of the goods will not violate any law whatsoever.

2. Seller expressly warrants that all goods covered by this order or other description or specification furnished by Buyer will be in exact accordance with such order, description or specification and free from defects in material and/or workmanship, and merchantable. Such warranty shall survive delivery, and shall not be deemed waived either by reason of Buyer's acceptance of said goods or by payment for them. Seller waives notice of breach of warranty.

   All clauses negating or disclaiming implied or express warranties or limiting Seller's liability are void. All warranties are explicitly extended to commence on the date of future performances.

   Seller understands the particular purpose the goods are to be used for or will inquire and Buyer relies on Seller's skill and judgement in that regard.

3. The Buyer reserves the right at any time to make changes in any one or more of the following: (a) Specifications, drawings and data incorporated in this purchase order where the items to be furnished are to be specially manufactured for the Buyer; (b) Methods of shipment or packing; (c) Place of delivery; and (d) Time of delivery. If any such change causes an increase or decrease in the cost of or the time required for performance of this purchase order, an equitable adjustment shall be made in the sale's price or delivery schedule, or both. Any claim by Seller for adjustment under this clause shall be deemed

waived unless asserted in writing within ten (10) days from receipt by Seller of the written change order. Acceptance, prior increases or extensions of time for delivery shall not be binding on Buyer unless evidenced by a Purchase Order Change Notice issued and signed by Buyer.

4. Buyer shall not be billed at prices higher than stated on this Purchase Order unless authorized by a Purchase Order Change Notice issued and signed by Buyer. Seller represents that the price charged for the goods covered by this order is the lowest price charged by the Seller to any Buyer. Seller agrees that any price reduction made on similar goods as those covered by this order subsequent to the placement of this order will be applicable to this order.

5. The specific quantity ordered must be delivered in full at the price slated and not be changed without Buyer's consent in writing. Any unauthorized quantity, defective goods or goods not in accordance with Buyer's specifications are by this agreement rejected and will be held for Seller's instruction at Seller's risk and if Seller so directs, will be returned at Seller's expense. If, at any time, Buyer feels insecure with respect to Seller's performance, it shall be conclusively presumed that Buyer's insecurity is commercially reasonable. Seller waives notice of Buyer's rejection and/or insecurity. In addition, if inspection discloses that part of the goods received are defective or not in accordance with Buyer's instructions or, specifications, Buyer shall have the right to cancel this order and/or any unshipped portion of this order. "Seller agrees that (it) will closely inspect all component parts of all material and equipment manufactured or fabricated for purchaser." Payment for goods or any act by Buyer which could be considered inconsistent with rejection of Buyer's insecurity or cancellation shall not constitute acceptance or waiver of any right

or remedies of Buyer, and is without prejudice to any and all claims that Buyer may have against Seller. Time is the essence of this purchase order.

6. This purchase order shall be construed according to the laws of the State of Pennsylvania. The passage of title and thus the sale from Seller to Buyer shall always be accomplished in the State of Pennsylvania regardless of the final destination of the goods. This purchase order may not be assigned or modified by Seller without Buyer's written consent. All counter offers shall constitute an attempt to modify and/or an attempt to accept this offer on terms additional to or different from those contained in this offer. Seller waives its right to a Mechanic's Lien.

   All rights and remedies of Buyer under this purchase order are additional to any of Buyer's other rights and remedies and are cumulative not alternative.

7. Seller shall indemnify and save Buyer and its customer, third party beneficiary hereof, free and harmless from and against any and all claims, damages, liabilities, expenses, costs or obligations of whatsoever kind, including but not limited to damage or destruction of property and injury or death of persons or patent infringements resulting from or connected with Seller's performance hereunder or any default by Seller or breach of any obligations hereunder.

[Filed Jan. 12, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 95 C 0217

ROBERTS & SCHAEFER COMPANY,
a Delaware corporation,
Plaintiff,

vs.

MERIT CONTRACTING, INC.
a Pennsylvania corporation,
Defendant.

NOTICE OF REMOVAL OF ACTION FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Now comes the defendant, MERIT CONTRATING, INC. ("MERIT"), by its attorney, LAWRENCE R. MOELMANN, and for its Notice of Removal of Action from the Circuit Court of Cook County, Illinois, pursuant to the provisions of 28 U.S.C. § 1441, states as follows:

1. On or about December 28, 1994, ROBERTS & SCHAEFER COMPANY ("R&S") filed its Complaint for Declaratory Judgment and Other Relief against MERIT in the Circuit Court of Cook County, Illinois as Case No. 94 CH 11635. A copy of this Complaint is attached hereto as Exhibit "A". (Note: The Complaint, as filed, did not contain a page 7).

2. R&S is a Delaware corporation with its principal place of business in Chicago, Illinois.

3. MERIT is a Pennsylvania corporation with its principal place of business in Monongahela, Pennsylvania.

4. The Complaint arises out of a construction project for the demolition, excavation, foundations and erection of a raw coal storage and handling facility in Somerset Portal near Eighty-Four, Pennsylvania. The amount in controversy exceeds $50,000.00, exclusive of interest and costs.

5. That the District Courts of the United States have original jurisdiction over this action based upon diversity of citizenship pursuant to the provisions of 28 U.S.C. § 1332. Accordingly, this action is properly removable to this District Court pursuant to the provisions of 28 U.S.C. § 1441. This Notice of Removal is timely because it is filed within thirty (30) days of the commencement of the proceedings in the Circuit Court of Cook County, Illinois.

6. That the only pertinent matters filed in the Circuit Court of Cook County are the Complaint (Exhibit "A") and a Motion for Leave to Initiate Discovery (Exhibit "B"). Attached hereto as Exhibit "C" is a copy of the Summons issued by the Circuit Court of Cook County. Upon information and belief, no other pleadings or orders have been filed or entered in the State Court proceedings.

7. Notice of this removal has been served upon counsel for the plaintiff. Additionally, a copy of this Notice has been filed with the Clerk for the Circuit Court of Cook County, Illinois.

WHEREFORE, this action should be removed to the United States District Court for the Northern District of Illinois pursuant to the provisions of 28 U.S.C. § 1441 for the reasons stated in this Notice.

MERIT CONTRACTING, INC.

By /s/ Lawrence R. Moelmann
One of Its Attorneys

[Filed Dec. 28, 1994]

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

No. 94 CH 11635

ROBERTS & SCHAEFER COMPANY,
a Delaware corporation,
Plaintiff,

v.

MERIT CONTRACTING, INC.,
a Pennsylvania corporation,
Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF

NOW COMES the Plaintiff ROBERTS & SCHAEFER COMPANY, by and through its attorneys Bollinger, Ruberry & Garvey, and for its Complaint against Defendant MERIT CONTRACTING, INC. states as follows:

The Parties, Venue and Jurisdiction

1. Plaintiff ROBERTS & SCHAEFER COMPANY ("R&S") is incorporated under the laws of the State of Delaware, and has its principal place of business in Chicago, Illinois.

2. Defendant MERIT CONTRACTING, INC. ("Merit") is incorporated under the laws of the State of Pennsylvania, and has its principal place of business in Monongahela, Pennsylvania.

3. R&S and Merit entered into a contract, the terms of which provide for resolution of disputes in the Circuit Courts of Illinois, as set forth hereinafter.

4. Merit has voluntarily subjected itself to the exclusive jurisdiction of the Illinois Circuit Courts.

The Purchase Orders

5. On November 1, 1993, R&S issued Purchase Order No. 9331-711 to Merit, for work in connection with the demolition, excavation, foundations and erection of a raw coal storage and handling facility, at a project known as the Eighty-Four Mining Company, in Somerset Portal near Eighty-Four, Pennsylvania. Seven change orders were issued in connection with the Purchase Order. Copies of Purchase Order No. 9331-711 and the change orders are attached hereto as Exhibit "A."

6. Merit accepted the Purchase Order, together with its terms and conditions. Thus, a contract existed between R&S and Merit.

7. The Purchase Order incorporated a subcontract agreement and contained various terms and conditions, including, *inter alia*, a no-lien provision. The general construction conditions designated Merit as the "Subcontractor", and the terms and conditions of purchase designated R&S as the "Buyer," and Merit as the "Seller."

8. The Purchase Order contained the following provisions:

* * * *

2.0 *PARTIAL WAIVER OF LIEN AND CONTRACTOR'S AFFIDAVIT*

As a requirement for payment, manufactures, materialmen, and sub-contractors shall submit to Roberts & Schaefer Company, with each pay request or invoice-voucher, your partial Waiver of Lien for the full amount of the requested payment and the partial Waiver of Lien for all subcontractors and suppliers to the extent of payment to them.

2.2 In addition, the Contractor's Affidavit (printed at the back of the form) shall be filled out listing the names and contract amount of your subcontractors and suppliers engaged in the performance of your contract with Roberts & Schaefer Company.

3.0 *FINAL WAIVER OF LIEN AND CONTRACTOR'S AFFIDAVIT*

3.1 All manufacturers, or materialmen request for *final* payment shall include its final Waiver of Lien which shall be for the full amount of its contract, including all change orders to the contract.

* * * *

3.4 Failure to submit Waiver of Liens with invoices will result in delayed payment and will be returned. Payment will not be made until all proper documentation is received.

Purchase Order No. 9331-711 at pages 7 and 8.

9. The terms and conditions of the Purchase Order, to which Merit agreed, contained the following provisions:

6. *TERMS AND CONDITIONS OF PURCHASE*

* * * *

6.14 *LAW GOVERNING*

This purchase order and all disputes between the parties hereto shall be governed by and construed according to the laws of Illinois whose Circuit Courts shall have exclusive jurisdiction to determine all such issues.

* * * *

6.22 *LIENS*

6.22 Seller [Merit] shall neither file nor cause to be filed any lien with respect to the Work to be performed or Equipment furnished hereunder and hereby

waives any right to file or cause such a lien to be filed. In the event any claim has been asserted against Seller or Buyer [R&S] or Owners or any lien has been filed with respect to the Work or Equipment, further payment shall not become due until all such claims or liens have been satisfied, released and/or discharged without cost or expense to Buyer or Owner. Buyer may, in default of Seller so to do, procure the release, satisfaction and discharge of any such claim or lien and deduct all monies paid to release or discharge such claim or lien, including the cost and expense thereof, from any money due or to become due hereunder; or, if final payment has been made, Seller shall claim or lien, including the cost and expense thereof. Seller, in its subcontracts and agreements with suppliers, shall require all subcontractors and suppliers to comply with the above obligations, including the waiver of the right to file liens.

* * * *

7. *LIENS AND WAIVERS*

7.1 Seller shall neither file nor cause to be filed any lien with respect to the Work to be performed or Equipment furnished hereunder and hereby waives any right to file or cause such a lien to be filed. In the event any claim has been asserted against Seller or Buyer or Owners or any lien has been filed with respect to the Work or Equipment, further payment shall not become due until all such claims or liens have been satisfied, released and/or discharged without cost or expense to Buyer or Owner.

7.2 Buyer may, in default of Seller so to do, procure the release, satisfaction and discharge of any such claim or lien and deduct all monies paid to release or discharge such claim or lien,

including the cost, attorney's fees and expense thereof, from any money due or to become due hereunder; or, if final payment has been made, Seller shall reimburse Buyer for all monies paid to discharge any such claim or lien, including the cost, attorney's fees and expense thereof. Seller, in its subcontracts and agreements, shall, in writing, require all subcontractors and suppliers to be bound by the above obligations, including the waiver of the right to file liens.

7.3 As a condition for payment due, Seller must submit to Buyer with its pay request or invoice-voucher a written waiver of lien and a written waiver of lien of all of its sub-contractors and suppliers for the full amount of the requested payment, whether partial or final payment.

7.4 Seller must also submit a affidavit listing the names of its suppliers and subcontractors showing the amount of their contract and the amount they then claim due them.

10. The Subcontract Agreement also provided in part:

Article XV. Subcontractor [Merit] hereby waives all right of lien existing or that may arise for work performed or material furnished under any lien laws upon the structure, the land upon which the same is situated, and upon any monies due or to become due to Contractor [R&S], and agrees to furnish a sufficient waiver of lien in form satisfactory to Contractor from all persons and corporations furnishing labor or materials under Subcontractor, for the structure and the land upon which the same is situated.

All materials, supplies, or equipment to be furnished by Subcontractor and installed or incorporated in the Work shall be free from the rights of vendors under conditional bills of sale, chattel mortgages, or any other encumbrances whatsoever . . .

11. On February 14, 1994, R&S issued a second Purchase Order, No. 9331-712, to Merit, also relating to the Eighty-Four Mining Co. project. Under this Purchase Order, Merit was to provide the electrical installation at the facility. A copy of Purchase Order No. 9331-712 is attached hereto as Exhibit "B".

Merit's Breach of the Contract

12. During the course of the project, disputes arose between the parties relating to delays in the construction and increased costs on the Project.

13. The actual completion dates for various portions of the work to be performed by Merit exceeded the projected dates contained within the Purchase Order.

14. Merit failed to submit waivers of lien to R&S, as provided within the terms of the contract as a condition for payment.

15. Merit has contacted the owner of the Project and indicated its intention to file a lien against the owner and the property for work it claims to have performed pursuant to the Purchase Order, but for which it has not been paid by R&S.

16. As a result of Merit's demands on the owner of the Project, the owner is withholding the retainage due R&S under the general contract between R&S and the owner.

17. Merit has breached the terms and conditions of the contract between it and R&S by contacting the owner and asserting a claim for lien.

18. As a direct result of Merit's breach of the contract, R&S has been damaged in that the owner has refused to release funds to R&S.

19. By virtue of Merit's actions, including but not limited to the following, Merit breached its contract with R&S by:

(a) failing to meet milestone dates as set forth in the contract and delaying completion of the Project;

(b) incurring additional costs in excess of those provided for in the contract;

(c) failing to provide waivers of lien as provided for in the contract as a condition for payment; and

(d) notifying the owner of the Project of its intention to file a lien and asserting lien rights.

Respectfully submitted,

By: /s/ Linda Urbanik Johnson
One of the attorneys for
Roberts & Schaefer Company

FILE COPY

ROBERTS & SCHAEFER CO.

Eastern Operation
William Penn Plaza
2790 Mosside Blvd.
Monroeville, PA 15146

Phone (412) 373-8020
(412) 373-7065

PURCHASE ORDER NO. 9331-711

Job No. 9331 EIGHTY-FOUR

Date November 1, 1993

PURCHASED FROM:

Merit Contracting, Inc.
600 Park Avenue
Monongahela, PA 15063

Attention: Mr. Clem Gigliotti
258-9009

SHIP TO:

Construction Services Required at
Eighty-Four Mining Co.
Somerset Portal near
Eighty-Four, PA 15330

INSTRUCTIONS: ORDER NUMBERS MUST BE SHOWN ON INVOICES, BILL OF LADING AND SHIPPING TAGS. PREPAID FREIGHT ADDED TO INVOICE MUST BE SUPPORTED BY ORIGINAL FREIGHT BILL OR CHARGES WILL BE DEDUCTED. NO BOXING OR CRATING CHARGES UNLESS SPECIFIED. TRANSPORTATION CHARGES INCLUDING THOSE OF SUBVENDORS SHOULD BE PREPAID AND FREIGHT BILL FORWARDED TO US.

QUANTITY	ITEM	DESCRIPTION	AMOUNT
		RAW COAL STORAGE AND HANDLING FACILITY	
1 LOT	A	Provide all UMWA labor, expendables, tools, machinery, equipment, supervision, certain construction materials, and insurance to execute the work outlined in the job specifications, R&S drawings, and scope of work.	$1,775,000.00
		PRICE BREAKDOWN	
		DEMOLITION, EXCAVATION, FOUNDATIONS, ERECTION .. .	$1,325,000.00
		RECLAIM TUNNEL INC. FURNISH & INSTALL ESCAPE TUBE .	$450,000.00
		TOTAL	$1,775,000.00
		CONFIRMING verbal order of 8-27-93 to Clem Gigliotti from Bill McCue.	
		Cost Code	
		401000 - $ 280,900 ÷ 10% invoiced 401170 - 195,800 ÷ 10% invoiced 401230 - 1,298,300	

Delivery: Per construction schedule

F.O.B.: Jobsite where applicable

Method: N/A

Freight: N/A

Pricing Basis: Phone quote of 8-27-93 from Clem Gigliotti Bill McCue.

Taxable ☐ Non-Taxable ☒

William R. McCue

William R. McCue P.A

THIS OFFER OR PURCHASE ORDER IS EXPRESSLY MADE CONDITIONAL ON ASSENT BY THE SELLER TO ALL TERMS ON FACE AND BACK HEREOF.

00051

91a

FILE COPY

ROBERTS & SCHAEFER CO.
Eastern Operation
William Penn Plaza
2790 Mosside Blvd.
Monroeville, PA 15146
Phone (412) 373-8020
(412) 373-7065

CHANGE ORDER
PURCHASE ORDER NO. 9331-711
Job No. 9331 EIGHTY-FOUR
Date November 12, 1993

PURCHASED FROM:

Merit Contracting, Inc.
600 Park Avenue
Monongahela, PA 15063

Attention: Mr. Ron McCracken
258-9009

SHIP TO:

Construction services required at
Eighty-Four Mining Co.
Somerset Prep. Plant
near Eighty-Four, PA 15330

INSTRUCTIONS: ORDER NUMBERS MUST BE SHOWN ON INVOICES, BILL OF LADING AND SHIPPING TAGS. PREPAID FREIGHT ADDED TO INVOICE MUST BE SUPPORTED BY ORIGINAL FREIGHT BILL OR CHARGES WILL BE DEDUCTED. NO BOXING OR CRATING CHARGES UNLESS SPECIFIED. TRANSPORTATION CHARGES INCLUDING THOSE OF SUBVENDORS SHOULD BE PREPAID AND FREIGHT BILL FORWARDED TO US.

QUANTITY	ITEM	DESCRIPTION	AMOUNT
		RAW COAL STORAGE AND HANDLING FACILITY	
		CHANGE ORDER – ADD #1	
1 LOT	A	Merit's original bid on the MCC building was for a block structure with inside dimensions of 30' x 15'. R&S enlarged the building to 30' x 20' inside. Extra 150 sq. ft. @ $41.00/sq. ft.	$6,150.00
		CONFIRMING.	
		COST CODE: 401230	

00052

Delivery: N/A
F.O.B.: N/A
Method: N/A
Freight: N/A
Basis: Per Merit letter quote of 11-9-93.

Taxable ☐ Non-Taxable ☒

William R. McCue P.A.

THIS OFFER OR PURCHASE ORDER IS EXPRESSLY MADE CONDITIONAL ON ASSENT BY THE SELLER TO ALL TERMS ON FACE AND BACK HEREOF.

92a

FILE COPY

ROBERTS & SCHAEFER CO.
Eastern Operation
William Penn Plaza
2790 Mosside Blvd.
Monroeville, PA 15146

...one (412) 373-8020
...x (412) 373-7065

CHANGE ORDER
PURCHASE ORDER NO. 9331-711
Job No. 9331 EIGHTY-FOUR
Date November 15, 1993

PURCHASED FROM:

Merit Contracting, Inc.
600 Park Avenue
Monongahela, PA 15063

Attention: Mr. Ron McCracken
258-9009

SHIP TO:

Construction services required at
Eighty-Four Mining Co.
Somerset Prep. Plant
near Eighty-Four, PA 15330

INSTRUCTIONS: ORDER NUMBERS MUST BE SHOWN ON INVOICES, BILL OF LADING AND SHIPPING TAGS. PREPAID FREIGHT ADDED TO INVOICE MUST BE SUPPORTED BY ORIGINAL FREIGHT BILL OR CHARGES WILL BE DEDUCTED. NO BOXING OR CRATING CHARGES UNLESS SPECIFIED. TRANSPORTATION CHARGES INCLUDING THOSE OF SUBVENDORS SHOULD BE PREPAID AND FREIGHT BILL FORWARDED TO US.

QUANTITY	ITEM	DESCRIPTION	AMOUNT
		RAW COAL STORAGE AND HANDLING FACILITY	
		CHANGE ORDER - ADD #2	
		Merit will field mount the following interference-fit half-couplings to the conveyor motor shafts: Couplings will be supplied by R&S.	
2	A	Falk #1110T10 with 3 7/8" bore to 700 HP motors of 72" Stockpile Feed Conv. $200.00	$400.00
1	B	Falk #1025G20 with 3 3/8" bore to 150 HP motor of 72" Transfer Conv.	$300.00
1	C	Falk #340FDO6AFD with 2 5/8" bore to 300 HP motor of 54" Reclaim Conv.	$300.00
		TOTAL	$1,000.00
		COST CODE: 451140	

Delivery: N/A
F.O.B.: N/A
Method: N/A
Freight: N/A
...g Basis: Per Merit letter quote of 10-25-93.

Taxable ☐ Non-Taxable ☒

William R. McCue P.A.

THIS OFFER OR PURCHASE ORDER IS EXPRESSLY MADE CONDITIONAL ON ASSENT BY THE SELLER TO ALL TERMS ON FACE AND BACK HEREOF.

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FILE COPY

ROBERTS & SCHAEFER CO.
Eastern Operation
William Penn Plaza
2790 Mosside Blvd.
Monroeville, PA 15146

one (412) 373-8020
ax (412) 373-7065

CHANGE ORDER
PURCHASE ORDER NO. 9331-711
Job No. 9331 EIGHTY-FOUR
Date November 15, 1993

PURCHASED FROM:

Merit Contracting, Inc.
600 Park Avenue
Monongahela, PA 15063

Attention: Mr. Ron McCracken
258-9009

SHIP TO:

Construction services required at
Eighty-Four Mining Co.
Somerset Prep. Plant
near Eighty-Four, PA 15330

INSTRUCTIONS: ORDER NUMBERS MUST BE SHOWN ON INVOICES, BILL OF LADING AND SHIPPING TAGS. PREPAID FREIGHT ADDED TO INVOICE MUST BE SUPPORTED BY ORIGINAL FREIGHT BILL OR CHARGES WILL BE DEDUCTED. NO BOXING OR CRATING CHARGES UNLESS SPECIFIED. TRANSPORTATION CHARGES INCLUDING THOSE OF SUBVENDORS SHOULD BE PREPAID AND FREIGHT BILL FORWARDED TO US.

QUANTITY	ITEM	DESCRIPTION	AMOUNT
		RAW COAL STORAGE AND HANDLING FACILITY	
		CHANGE ORDER – ADD #3	
1 LOT	A	Screening building foundations, originally estimated to be built on caissons, will now be excavated to approx. 16 ft. below grade (to stone), footers formed and Sonotube piers poured, including reinforcing steel, compacted backfill and installation of anchor bolts in foundations.	$62,050.00
1 LOT	B	Deduct work priced at the time of the original bid which is now included in the amount listed in item A. This work includes 25 cu. yds. of concrete piers and walls including furnish and install re-steel and labor only for installing caisson re-steel.	
		CREDIT	-19,700.00
		TOTAL	$42,350.00
		NOTE The truck mat pricing which includes 25 cu. yd. of concrete and 4375# of re-steel was not affected by the above pricing change and remains part of the original contract.	
		COST CODE: 401230	

Delivery: N/A
F.O.B.: N/A
Method: N/A
Freight: N/A
Pricing Basis: Per Merit letter quote of 10-25-93.

Taxable ☐ Non-Taxable ☒

William R. McCue

William R. McCue P.A.

THIS OFFER OR PURCHASE ORDER IS EXPRESSLY MADE CONDITIONAL ON ASSENT BY THE SELLER TO ALL TERMS ON FACE AND BACK HEREOF.

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FILE COPY

ROBERTS & SCHAEFER CO.
Eastern Operation
William Penn Plaza
2790 Mosside Blvd.
Monroeville, PA 15146

Phone (412) 373-8020
Fax (412) 373-7065

CHANGE ORDER
PURCHASE ORDER NO. 9331-711

Job No. 9331 EIGHTY-FOUR

Date February 4, 1994

PURCHASED FROM:

Merit Contracting, Inc.
600 Park Avenue
Monongahela, PA 15063

Attention: Mr. Clem Gigliotti
258-9009

SHIP TO:

Eighty Four Mining Co. jobsite

INSTRUCTIONS: ORDER NUMBERS MUST BE SHOWN ON INVOICES, BILL OF LADING AND SHIPPING TAGS. PREPAID FREIGHT ADDED TO INVOICE MUST BE SUPPORTED BY ORIGINAL FREIGHT BILL OR CHARGES WILL BE DEDUCTED. NO BOXING OR CRATING CHARGES UNLESS SPECIFIED. TRANSPORTATION CHARGES INCLUDING THOSE OF SUBVENDORS, SHOULD BE PREPAID AND FREIGHT BILL FORWARDED TO US.

QUANTITY	ITEM	DESCRIPTION	AMOUNT
		RAW COAL STORAGE AND HANDLING FACILITY	
		CHANGE ORDER – ADD #4	
		Merit's bid to R&S did not include stone or filter fabric as follows:	
200 T	A	#57 Stone used in underground ditch at storage pile perimeter. $10.86/T	$2,172.00
4	B	Rolls of filter fabric for use in ditch in item A. . . $225.00/roll . .	$900.00
628.5T	C	#57 Stone used under reclaim tunnel foundation. . . $10.86/T	$6,826.00
		TOTAL	$9,898.00
		Cost Code: 401230	

Delivery: N/A

F.O.B.: Jobsite

Method: N/A

Freight: Included

Pricing Basis: Merit letter quote of 12-20-94

Taxable ☐ Non-Taxable ☒

William R. McCue

William R. McCue P.A.

THIS OFFER OR PURCHASE ORDER IS EXPRESSLY MADE CONDITIONAL ON ASSENT BY THE SELLER TO ALL TERMS ON FACE AND BACK HEREOF.

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95a

FILE COPY

ROBERTS & SCHAEFER CO.
Eastern Operation
William Penn Plaza
2790 Mosside Blvd.
Monroeville, PA 15146

one (412) 373-8020
rax (412) 373-7065

CHANGE ORDER
PURCHASE ORDER NO. 9331-711

Job No. 9331 EIGHTY-FOUR

Date February 4, 1994

PURCHASED FROM:

Merit Contracting, Inc.
600 Park Avenue
Monongahela, PA 15063

Attention: Mr. Clem Gigliotti
258-9009

SHIP TO:

Eighty Four Mining Co. Jobsite

96a

INSTRUCTIONS: ORDER NUMBERS MUST BE SHOWN ON INVOICES, BILL OF LADING AND SHIPPING TAGS. PREPAID FREIGHT ADDED TO INVOICE MUST BE SUPPORTED BY ORIGINAL FREIGHT BILL OR CHARGES WILL BE DEDUCTED. NO BOXING OR CRATING CHARGES UNLESS SPECIFIED. TRANSPORTATION CHARGES INCLUDING THOSE OF SUBVENDORS, SHOULD BE PREPAID AND FREIGHT BILL FORWARDED TO US.

QUANTITY	ITEM	DESCRIPTION	AMOUNT
		RAW COAL STORAGE AND HANDLING FACILITY	
		CHANGE ORDER - ADD #5	
1 LOT	A	Merit's orginal bid for the reinforcing steel in the reclaim tunnel was based on 200#/cu. yd. The actual quantity of reinforcing steel was approx. 255#/cu. yd. The volume of concrete is 1419 cu yd.	
		SUMMARY OF REINFORCING STEEL	
		ACTUAL QUANTITY 362,000#	
		BID QUANTITY 283,800#	
		DIFFERENCE 78,200# @ .62/lb.	$48,484.00
		Cost Code: 401230	

Delivery: N/A

F.O.B.: N/A

Method: N/A

Freight: N/A

Pricing Basis: Per Merit letter quote of 11-23-93

Taxable ☐ Non-Taxable ☒

William R. McCue P.A.

William R. McCue P.A.

THIS OFFER OR PURCHASE ORDER IS EXPRESSLY MADE CONDITIONAL ON ASSENT BY THE SELLER TO ALL TERMS ON FACE AND BACK HEREOF.

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FILE COPY

ROBERTS & SCHAEFER CO.
Eastern Operation
William Penn Plaza
2790 Mosside Blvd.
Monroeville, PA 15146

Phone (412) 373-8020
Fax (412) 373-7065

CHANGE ORDER
PURCHASE ORDER NO. 9331-711

Job No. 9331 EIGHTY-FOUR

Date February 7, 1994

PURCHASED FROM:

Merit Contracting, Inc.
600 Park Avenue
Monongahela, PA 15063

Attention: Mr. Clem Gigliotti
258-9009

SHIP TO:

Eighty Four Mining Co. jobsite

INSTRUCTIONS: ORDER NUMBERS MUST BE SHOWN ON INVOICES, BILL OF LADING AND SHIPPING TAGS. PREPAID FREIGHT ADDED TO INVOICE MUST BE SUPPORTED BY ORIGINAL FREIGHT BILL OR CHARGES WILL BE DEDUCTED. NO BOXING OR CRATING CHARGES UNLESS SPECIFIED. TRANSPORTATION CHARGES INCLUDING THOSE OF SUBVENDORS SHOULD BE PREPAID AND FREIGHT BILL FORWARDED TO US.

QUANTITY	ITEM	DESCRIPTION	AMOUNT
1 LOT	A	RAW COAL STORAGE AND HANDLING FACILITY CHANGE ORDER – ADD #6 Fabricate/pour concrete counterweights for the various conveyors as shown below and as detailed on dwg. 9331-F7:	$9,386.00 LOT

Location	No. Pieces	Total Weight
72" Stockpile Feed Conv.	11	29,018#
72" Transfer Conv.	5	10,542#
54" Reclaim Conv.	6	10,945#
48" Plant Feed Conv.	4	3,811#

CONFIRMING. DO NOT DUPLICATE.

Cost Code: 201050

Delivery: As required for erection schedule

F.O.B.: Jobsite

Method: Your means

Freight: Included

Pricing Basis: Merit FAX quote of 2-1-94

Taxable ☐ Non-Taxable ☒

William R. McCue P.A.

THIS OFFER OR PURCHASE ORDER IS EXPRESSLY MADE CONDITIONAL ON ASSENT BY THE SELLER TO ALL TERMS ON FACE AND BACK HEREOF.

00057

97a

FILE COPY

ROBERTS & SCHAEFER CO.
Eastern Operation
William Penn Plaza
2790 Mosside Blvd.
Monroeville, PA 15146

Phone (412) 373-8020
Fax (412) 373-7065

CHANGE ORDER
PURCHASE ORDER NO. 9331-711

Job No. 9331 EIGHTY-FOUR

Date February 21, 1994

PURCHASED FROM:

Merit Contracting, Inc.
600 Park Avenue
Monongahela, PA 15063

Attention: Mr. Clem Gigliotti
258-9009

SHIP TO:

Eighty-Four Mining Co. jobsite

98a

INSTRUCTIONS: ORDER NUMBERS MUST BE SHOWN ON INVOICES, BILL OF LADING AND SHIPPING TAGS. PREPAID FREIGHT ADDED TO INVOICE MUST BE SUPPORTED BY ORIGINAL FREIGHT BILL OR CHARGES WILL BE DEDUCTED. NO BOXING OR CRATING CHARGES UNLESS SPECIFIED. TRANSPORTATION CHARGES INCLUDING THOSE OF SUBVENDORS, SHOULD BE PREPAID AND FREIGHT BILL FORWARDED TO US.

QUANTITY	ITEM	DESCRIPTION	AMOUNT
		RAW COAL STORAGE AND HANDLING FACILITY	
		CHANGE ORDER – ADD #7	
		Merit's original bid for the conduit run between the MCC bldg. and the 54" reclaim Conv. truss included a distance of 10'. R&S moved the MCC bldg. approx. 20' farther away from the conv.	
1 LOT	A	Merit will furnish and install 4" std. pipe support with cross beam on top, (2) Sonotube type foundation supports and install only R&S supplied conduit bridge all as shown on R&S dwg. 9331-E100.	$2,200.00
		CONFIRMING. DO NOT DUPLICATE.	
		Cost Code: 401170	

Delivery: as required for erection schedule

F.O.B.: Jobsite

Method: Your means

Freight: Included

Pricing Basis: E.S. & M. quote of 2-17-94 and phone conversation of 2-18-94 between Larry Hussar and Bill McCue.

Taxable ☐ Non-Taxable ☒

William R. McCue

William R. McCue P.A.

THIS OFFER OR PURCHASE ORDER IS EXPRESSLY MADE CONDITIONAL ON ASSENT BY THE SELLER TO ALL TERMS ON FACE AND BACK HEREOF.

00058

ROBERTS & SCHAEFER COMPANY

Engineers & Contractors
Eastern Operation

William Penn Plaza
2790 Mosside Blvd.
Monroeville, PA 15146
Phone: 412-373-8020

November 11, 1993

Merit Contracting, Inc.
600 Park Avenue
Monongahela, PA 15063

Attention: Mr. Ronald C. McCracken
Senior Vice President

Reference: R&S P.O. #9331-711
JOB #931 EIGHTY-FOUR

Dear Mr. McCracken:

We are enclosing revised pages 2, 5 and 6 of the purchase order document. They have been revised to reflect the points which we discussed on 11-4-93 regarding the contract concrete volume and liquidated damages.

Please replace the existing pages with these revised sheets. If you have any additional questions or comments, please do not hesitate to call.

Sincerely,

/s/ William R. McCue
WILLIAM R. MCCUE
Project Manager

SCOPE OF WORK

1. The construction contract will include, but is not necessarily limited to, the items tabulated below. Process equipment, structural steel, platework, field bolts, anchor bolts and piping materials will be furnished by others. Merit Contracting will be responsible for providing the required demolition of certain existing structures and conveyors and for providing the complete erection services for the Raw Coal Storage and Handling Facility specified in the Eighty-Four Mining Co. bid document given to Merit during the proposal phase of this project.

2. Move in, mobilize, provide all UMWA labor, supervision, tools, consumables, insurance, scaffolding, construction equipment, etc.

3. Provide site clearing, erosion and sediment control, site grading, final grading, and seeding and mulching.

4. Merit will provide field survey from a benchmark or monument provided by the owner.

5. Furnish and install concrete in place, including excavation, re-bar, wire mesh, water stops, expansion and construction joints, forms, tie wire and compacted backfill. Anchor bolts will be furnished to Merit by R&S. The following quantities of concrete and re-bar are included in your contract.

Location	Concrete	Re-Bar
Reclaim Tunnel	1419 cu. yd.	200#/yd.
72″ Stockpile Conv., 54″ Reclaim Conv. and 48″ Plant Feed Conv.	238 cu. yd.*	175#/yd.
Scalping/Screening Structure	50 cu. yd.**	175#/yd.

* Rev. 11-9-93 (was 278 cu. yd.)

** Includes truck slab of 25 cu. yd.

[Page 3]

6. Compaction testing and concrete testing will be by Merit as directed in the bid document.

7. Merit includes constructing an MCC building with inside dimensions of 15′W x 30′L x 10′H with concrete footers, 8″ plain concrete block walls and 5″ thick concrete floor and roof slabs.

   Merit will include all excavation, compaction, concrete, reinforcing, blockwork, lintels and galvanized roof decking. R&S will supply doors, windows (if req'd), embedded bases for equipment and roof support beams.

8. R&S will shop install conveyor idlers, backstops, bearings to shafts and interference-fit couplings. Merit will field install clearance-fit couplings, pulley assemblies, speed reducers, hoops and covers.

9. Most items shipped to the site will be completely painted. Certain items such as doors will be shipped prime painted and finish painting by Merit is part of this contract. Merit is responsible for all touch-up painting. All paint will be by R&S.

10. Caissons (if req'd.) will be drilled and poured by others. Merit will tie the reinforcing steel cages which will be installed by others.

11. Merit will include pulling the conveyor belts as furnished by the owner and installing vulcanized splices.

12. Merit will furnish and install the escape tube at the east end of the reclaim tunnel. A vent fan and fan access will be furnished by R&S and field installed by Merit. Merit will furnish and install the concrete floor in the escape tube.

13. R&S will furnish and Merit will field install two belt scales, one on the 72″ Stockpile Conv. and one on the 54″ Reclaim Conv.

14. Merit will remove the existing conveyor trustees in large sections during the demolition stage of this contract, rather than cutting them into smaller pieces as directed in the job specs.

15. Roofing and siding will be furnished by R&S to Merit for installation.

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WORK COMPLETION SCHEDULE

Time is of the essence of this Contract and SUB-CONTRACTOR shall commence the Work on or about September 1, 1993 and be able to operate the Raw Coal Handling System for mechanical and electrical check on or before January 31, 1994, and complete the work to the OWNER's satisfaction to run coal on or before March 1, 1994. Such full period, i.e., through March 1, 1994, shall be referred to as the "Work Completion Schedule." All punch list items to be completed 30 days thereafter.

CONTRACT PRICE AND PAYMENT

As total compensation for the Work, CONTRACTOR shall pay SUB-CONTRACTOR and SUB-CONTRACTOR agrees to accept the lump sum not-to-exceed price of $1,775,000.00 according to SUB-CONTRACTOR's Proposal.

Partial payments, as provided for, shall have retained therefrom an amount equal to ten percent (10%) of each payment. The making of such partial payments to SUB-CONTRACTOR shall not be construed as a waiver by CONTRACTOR of any of SUB-CONTRACTOR's obligations hereunder. Partial payments shall be made within thirty (30) days after receipt of satisfactory monthly invoices, with appropriate supporting documentation, for payment for the previous month's work. Such invoices shall be in a form acceptable to CONTRACTOR. The CONTRACTOR may also decline to approve any invoice for payment, or it may nullify in whole or in part any approval previously made to such extent as may be necessary in its opinion because of the reasons listed.

A. SUB-CONTRACTOR's failure to perform the Work in accordance with this Contract, including but not limited to, its failure to correct defective Work; or Third party claims or liens filed or reasonable evidence indicating probable filing of such claims or liens; or

B. SUB-CONTRACTOR's failure to make payments to a subcontractor or supplier; or

C. Reasonable evidence that the Work cannot be completed for the unpaid balance of the SUB-CONTRACTOR's compensation; or

[Page 5]

D. Physical damage to the OWNER's personal or real property, or the property of another contractor; or

E. Reasonable evidence that the Work will not be completed within the Work Completion Schedule; or

F. SUB-CONTRACTOR's failure to adequately support invoices.

G. SUB-CONTRACTOR's failure to comply with any other provisions of this agreement. Payments so withheld thereafter shall be made as such grounds for withholding are removed.

Retained amounts and final payment shall be paid to SUB-CONTRACTOR within thirty (30) days from completion and the OWNER's final acceptance of the Work; provided, however, that neither the final payment nor the retained amount shall become due until the SUB-CONTRACTOR submits within thirty (30) days after final acceptance of the Work, (1) an affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the OWNER or its property might in any way be responsible, have been paid or otherwise satisfied, (2) consent of surety, if any, to final payment and (3) other data establishing payment or satisfaction of all such obligations, including but not limited to receipts, releases and waivers of liens arising out of this Contract, to the extent and in such form as may be acceptable to CONTRACTOR. If any subcontractor refuses to furnish a release or waiver required by CONTRACTOR, the SUB-CONTRACTOR may furnish a bond satisfactory to CONTRACTOR to indemnify CONTRACTOR against all costs and attorneys' fees incurred in an attempt to obtain a release or waiver of any such lien and any other costs incurred by CONTRACTOR in connection therewith. If any such lien remains unsatisfied after all payments are made, the SUB-CONTRACTOR shall reimburse CONTRACTOR for all costs incurred by CONTRACTOR in discharging such lien, including attorneys' fees. Nothing done pursuant to the provisions of this Article, nor the final acceptance of the Work by CONTRACTOR, shall relieve SUB-CONTRACTOR of its obligation to protect and indemnify the CONTRACTOR of any other obligations whatever provided in this Contract which extend by their nature beyond the date of such final acceptance.

In addition to other remedies, the CONTRACTOR is authorized to deduct out of monies which may be due or become due to SUB-CONTRACTOR under the Contract, as damages for noncompletion of work within the time stipulated for its completion in "Work Completion Sched-

ule" the following amounts for each and every calendar day, up to and including sixty (60) days, which exceeds the time for completion stated herein.

Penalty	Time Frame	Max. Exposure
$1000/day	First 15 days	$ 15,000
$2000/day	Next 15 days	$ 30,000
$5000/day	Next 30 days	$150,000
	Total	$195,000

The above listed amounts will be used in lieu of estimating such damages. The parties hereby agree upon these amounts as the liquidated damages that the CONTRACTOR will suffer by reason of such default and not by way of penalty, and to retain from time to time out of monies due SUB-CONTRACTOR hereunder such amounts as may be reasonably required to compensate the CONTRACTOR for any loss, damages or costs including attorneys' fees, it sustains or may sustain by reason of SUB-CONTRACTOR's breach of this Construction Agreement or by reason of any other claims the CONTRACTOR may have against SUB-CONTRACTOR. The assessment of damages for noncompletion of work within the stipulated time period under "Work Completion Schedule" shall be limited to ten percent (10%) of the total contract price.

[VOID]

D. Physical damage to the OWNER's personal or real property, or the property of another contractor; or

E. Reasonable evidence that the Work will not be completed within the Work Completion Schedule; or

F. SUB-CONTRACTOR's failure to adequately support invoices.

G. SUB-CONTRACTOR's failure to comply with any other provisions of this agreement. Payments so withheld thereafter shall be made as such grounds for withholding are removed.

Retained amounts and final payment shall be paid to SUB-CONTRACTOR within thirty (30) days from completion and the OWNER's final acceptance of the Work; provided, however, that neither the final payment nor the retained amount shall become due until the SUB-CONTRACTOR submits within thirty (30) days after final acceptance of the Work, (1) an affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the OWNER or its property might in any way be responsible, have been paid or otherwise satisfied, (2) consent of surety, if any, to final payment and (3) other data establishing payment or satisfaction of all such obligations, including but not limited to receipts, releases and waivers of liens arising out of this Contract, to the extent and in such form as may be acceptable to CONTRACTOR. If any subcontractor refuses to furnish a release or waiver required by CONTRACTOR, the SUB-CONTRACTOR may furnish a bond satisfactory to CONTRACTOR to indemnify CONTRACTOR against all costs and attorneys' fees incurred in an attempt to obtain a release or waiver of any such lien and any other costs incurred by CONTRACTOR in connection therewith. If any such lien remains unsatisfied after all payments are made, the

SUB-CONTRACTOR shall reimburse CONTRACTOR for all costs incurred by CONTRACTOR in discharging such lien, including attorneys' fees. Nothing done pursuant to the provisions of this Article, nor the final acceptance of the Work by CONTRACTOR, shall relieve SUB-CONTRACTOR of its obligation to protect and indemnify the CONTRACTOR of any other obligations whatever provided in this Contract which extend by their nature beyond the date of such final acceptance.

In addition to other remedies, the CONTRACTOR is authorized to deduct out of monies which may be due or become due to SUB-CONTRACTOR under the Contract, as damages for noncompletion of work within the time stipulated for its completion in "Work Completion Schedule," 5,000.00 dollars ($5,000.00) per day

[VOID]

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SCOPE OF WORK

1. The construction contract will include, but is not necessarily limited to, the items tabulated below. Process equipment, structural steel, platework, field bolts, anchor bolts and piping materials will be furnished by others. Merit Contracting will be responsible for providing the required demolition of certain existing structures and conveyors and for providing the complete erection services for the Raw Coal Storage and Handling Facility specified in the Eighty-Four Mining Co. bid document given to Merit during the proposal phase of this project.
2. Move in, mobilize, provide all UMWA labor, supervision, tools, consumables, insurance, scaffolding, construction equipment, etc.
3. Provide site clearing, erosion and sediment control, site grading, final grading, and seeding and mulching.
4. Merit will provide field survey for a benchmark or monument provided by the owner.
5. Furnish and install concrete in place, including excavation, re-bar, wire mesh, water stops, expansion and construction joints, forms, tie wire and compacted backfill. Anchor bolts will be furnished to Merit by R&S. The following quantities of concrete and re-bar are included in your contract.

LOCATION	CONCRETE	RE-BAR
RECLAIM TUNNEL	1419 cu. yd.	200 # /yd.
72″ STOCKPILE CONV., 54″ RECLAIM CONV. AND 48″ PLANT FEED CONV.	278 cu. yd.	175 # /yd.
SCALPING/SCREENING STRUCTURE	* 50-cu.yd.	175 # /yd.

* Includes truck slab of 25 cu yd.

[VOID]

[Page 5]

D. Physical damage to the OWNER's personal or real property, or the property of another contractor; or

E. Reasonable evidence that the Work will not be completed within the Work Completion Schedule; or

F. SUB-CONTRACTOR's failure to adequately support invoices.

G. SUB-CONTRACTOR's failure to comply with any other provisions of this agreement. Payments so withheld thereafter shall be made as such grounds for withholding are removed.

Retained amounts and final payment shall be paid to SUB-CONTRACTOR within thirty (30) days from completion and the OWNER's final acceptance of the Work; provided, however, that neither the final payment nor the retained amount shall become due until the SUB-CONTRACTOR submits within thirty (30) days after final acceptance of the Work, (1) an affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the OWNER or its property might in any way be responsible, have been paid or otherwise satisfied, (2) consent of surety, if any, to final payment and (3) other data establishing payment or satisfaction of all such obligations, including but not limited to receipts, releases and waivers of liens arising out of this Contract, to the extent and in such form as may be acceptable to CONTRACTOR. If any subcontractor refuses to furnish a release or waiver required by CONTRACTOR, the SUB-CONTRACTOR may furnish a bond satisfactory to CONTRACTOR to indemnify CONTRACTOR against all costs and attorneys' fees incurred in an attempt to obtain a release or waiver of any such lien and any other costs incurred by CONTRACTOR in connection therewith. If any such lien remains unsatisfied after all payments are made, the

SUB-CONTRACTOR shall reimburse CONTRACTOR for all costs incurred by CONTRACTOR in discharging such lien, including attorneys' fees. Nothing done pursuant to the provisions of this Article, nor the final acceptance of the Work by CONTRACTOR, shall relieve SUB-CONTRACTOR of its obligation to protect and indemnify the CONTRACTOR of any other obligations whatever provided in this Contract which extend by their nature beyond the date of such final acceptance.

In addition to other remedies, the CONTRACTOR is authorized to deduct out of monies which may be due or become due to SUB-CONTRACTOR under the Contract, as damages for noncompletion of work within the time stipulated for its completion in "Work Completion Schedule," 5,000.00 dollars ($5,000.00) per day

[VOID]

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for each and every calendar day which exceeds the time for completion stated herein which in view of difficulties of estimating such damages, the parties hereby agree upon as the liquidated damages that the CONTRACTOR will suffer by reason of such default and not by way of penalty, and to retain from time to time out of monies due SUB-CONTRACTOR hereunder such amounts as may be reasonably required to compensate the CONTRACTOR for any loss, damages or costs including attorneys' fees, it sustains or may sustain by reason of SUB-CONTRACTOR's breach of this Construction Agreement or by reason of any other claims the CONTRACTOR may have against SUB-CONTRACTOR. The assessment of damages for noncompletion of work within the stipulated time period under "Work Completion Schedule" shall be limited to ten percent (10%) of the total contract price.

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1.0 *SUB-CONTRACT AGREEMENT*

1.1 We are enclosing two (2) copies of "Sub-Contract Agreement" document. Please sign both copies and return one to this office. The signed "Sub-Contract Agreement" along with proof of all insurance coverage included under Article XVII of the document must be on file in this office and up to date for the period when work is being performed.

2.0 *PARTIAL WAIVER OF LIEN AND CONTRACTOR'S AFFIDAVIT*

2.1 As a requirement for payment, manufacturers, materialmen, and sub-contractors shall submit to Roberts & Schaefer Company, with each pay request or invoice-voucher, your partial Waiver of Lien for the full amount of the requested payment and the partial Waiver of Lien for all sub-contractors and suppliers to the extent of payment to them.

2.2 In addition, the Contractor's Affidavit (printed at the back of the form) shall be filled out listing the names and contract amount of your sub-contractors and suppliers engaged in the performance of your contract with Roberts & Schaefer Company.

3.0 *FINAL WAIVER OF LIEN AND CONTRACTOR'S AFFIDAVIT*

3.1 All manufacturers, or materialmen request for *final* payment shall include its Final Waiver of Lien which shall be for the full amount of its contract, including all change orders to the contract.

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3.2 Sub-contractors shall furnish the same requirements, *plus* Final Waivers of Lien from all sub-contractors and suppliers for which Final Waivers of Lien have not previously been submitted.

3.3 In addition, the Contractor's Affidavit (printed at the back of the form) shall be filled out listing the names and contract amount of your sub-contractors and suppliers engaged in the performance of your contract with Roberts & Schaefer Company.

3.4 Failure to submit Waiver of Liens with invoices will result in delayed payment and will be returned. Payment will not be made until all proper documentation is received.

STEEL & MECHANICAL ERECTION

Provide all the necessary U.M.W.A. labor, selected materials, construction equipment and supervision including all miscellaneous consumables to perform the Steel & mechanical Erection including all start-up procedures to insure a fully operational system.

All work shall be performed in strict accordance to the following specifications:

1. Roberts & Schaefer Company Construction General Notes & Conditions.
2. Owner's Specification.
3. Deleted.
4. Deleted.
5. Project Schedule and Milestone Dates.
6. Terms and Conditions of Purchase.
7. Liens and Waivers.
8. Deleted.
9. Subcontractor Supplied Materials.
10. Deleted.
11. Extra Work.
12. Equipment Rates.
13. Backcharges.
14. Special Provisions.

1. *ROBERTS & SCHAEFER COMPANY CONSTRUCTION GENERAL NOTES & CONDITIONS*

1.1 Roberts & Schaefer Company's estimated take off sheets were supplied to aid the Subcontractor in the preparation of his quotation. These documents were intended to set forth Roberts & Schaefer Company's requirements for the facilities to be constructed. If the Subcontractor required clarification on any item or if there were any discrepancies in or omissions from the quantity sheets, the same was promptly called to the attention of the Roberts & Schaefer Project Engineer, in order that the correct information may be secured.

1.2 The quantities listed on these take off sheets represented Roberts & Schaefer Company's estimated quantities deemed necessary for the completion of this project. The Subcontractor has satisfied himself that the quantities provided are sufficient in determining a firm lump sum price for all work as outlined.

1.3 Upon issuance of a Purchase Order and Subcontract Agreement, Roberts & Schaefer Company's contract documents, design drawings and contract specifications shall take precedence on this project.

1.4 The subcontract price will be adjusted only for scope of work changes directed by the Owner, that differ from the drawings and specifications incorporated as a part of the contract documents. The Owner shall be the sole judge regarding scope of work changes.

1.5 Additional items of work not covered by quoted unit prices will be performed at either mutually agreed upon unit prices, on a cost-plus basis or at

a lump sum price as may be equitable to the circumstances. Roberts & Schaefer reserves the right to audit the Subcontractor's proposal for all additional items of work.

1.5 This provision will in no way entitle the Subcontractor to additional compensation for additional items or quantities of work caused by his errors in judgment or performance, his inefficiencies, or for items of work not specifically described herein but which are considered integral with this type of work and might reasonably be expected to be included in the quoted price of the work.

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1.7 The drawings and specifications of these Contract Documents are "scope" documents which indicate the general scope of the project in terms of the design concept; the general dimensions and location of buildings and facilities; the type of structural, mechanical, electrical, and utility system; and a general description of major equipment. As "scope" documents, the drawings and specifications do not necessarily indicate or describe all work required for the full performance and completion of the work. Subcontractor recognizes and accepts the design-build risk concept and will be responsible for furnishing all items, described or implied, and required for proper completion of the work. Subcontractor will also be responsible for directing and coordinating the various parts to the work so that no part shall be left in an unfinished or incomplete conditions.

1.8 It is understood that the Subcontractor will at all times be required to properly connect and coordinate his work with the work of Roberts & Schaefer Company, Owner and other Subcontractors as contemplated in these Contract Documents. If the

Contract Documents indicate that any part of Subcontractor's work depends for proper execution and results upon the work of Roberts & Schaefer Company, Owner or any other Subcontractor, then the Subcontractor shall promptly notify Roberts & Schaefer Company of any defects in the Contract Documents that will render the same unsuitable for proper connection, coordination and completion along with the work of Owner and/or other Roberts & Schaefer Company Subcontractors, if any.

1.9 The Owner and/or Roberts & Schaefer Company will not be liable to the Subcontractor, their suppliers or subcontractors for any change in labor affiliation during the course of this project. It shall be expressly understood that all additional costs, if any, will be borned by the Subcontractor for their portion of the work, in the event any such change does occur. "Subcontractors must satisfy themselves by such means as they think necessary, as to the location of, and conditions affecting the proposed work and the cost thereof".

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1.10 The Subcontractor will not at any time make claim to any additional payments or considerations on account of any misunderstanding regarding the nature or amount of work to be done. Similarly, no extenuating circumstances will be claimed by the Subcontractor as causing delay or added costs due to the Owner's operations or others engaged by the Owner on the same site shall be justification for any claims against Roberts & Schaefer Company or the Owner. The site visit, prior to bidding, should clarify owner's routine operations. No allowance will be made for lack of full knowledge or improper evaluation of the documents, the site or any conditions.

1.11 Roberts & Schaefer company will provide to the Subcontractor copies of material delivery schedules as they become available and copies of updated schedules monthly. It will be the Subcontractor's responsibility to insure proper co-ordination so as not to delay the project. The Subcontractor shall notify Roberts & Schaefer Company in writing immediately when such materials delays affect the Project Schedule. Roberts & Schaefer Company's sole intent in providing these schedules is for information purposes only, and Roberts & Schaefer makes no guarantee or representations that deliveries will be made as indicated. Subcontractor will not use this information as a basis for filing claims for time extensions or increased costs. Roberts & Schaefer Company reserves the right to audit the Subcontractor's total project records in the event of any claims.

1.12 All Owner requested extra work will be processed through Roberts & Schaefer Company. Subcontractor will not perform said work directly for the Owner during the life of this project without the express written consent of Roberts & Schaefer Company.

1.13 All Subcontractor's subtier contractors must be approved by Roberts & Schaefer Company prior to any issuance of an order.

1.14 Subcontractor has included labor for all unloading, checking in, storage and protection of Roberts & Schaefer and/or Owner supplied equipment and materials for the project.

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The Subcontractor shall check and insure that all materials are of proper size, length, etc. prior to the actual installation of said item. Any discrepancies found shall be reported immediately and shall not

be any basis for any claim of additional compensation.

Roberts & Schaefer will provide assistance with the checking in process. When it is agreed by both parties that orders are complete, the equipment and/or materials will become the Subcontractor's responsibility for protection and storage.

1.15 In the case of damaged materials, it will be the Subcontractor's responsibility to provide Roberts & Schaefer Company with the necessary information to file claim, such as a signed copy of the freight bill by the carrier's driver noting the damage. Roberts & Schaefer Company will be responsible for replacing any damaged materials. Failure to inspect and account for materials furnished by Roberts & Schaefer Company upon delivery will not be a basis for any time extensions should shortages occur.

1.16 The Subcontractor has included in his proposal the labor expense of the start-up procedures for the machinery and equipment erected. This includes both the "empty" and "loaded" phases to start-up. *Overtime,* as required to make the tie-ins into the existing facility is also included.

1.17 Subcontractor has included in his proposal all construction equipment, tools, fuel, lubricants, welding rods, oxygen, acetylene, welding tips, etc., including any and all miscellaneous consumables required for the construction of the project. Where certain construction operations require specialized equipment, the Subcontractor has included the same even though no mention is made thereof.

1.18 Any security measures deemed necessary at the jobsite will be furnished by the Subcontractor.

1.19 Machinery guards will generally be shop fabricated. However, it is understood that there may be some minor field fabrication of guards.

1.20 Platework, sumps, tanks, etc., smaller than 10′-0 diameter or square will be shop fabricated as one piece. However, Duraline Liner will be field installed if applicable and *SUPPLIED BY THE SUBCONTRACTOR.*

1.21 Generally, all steel plate liners as specified for mechancial platework will be shop installed. Structural bin liner plates generally will be field installed. Structural platework will be shop fabricated into largest sections permissible for shipment by truck.

1.22 All ceramic liners for platework will be shop installed. Minor repairs may be required due to shipping, handling, etc. On platework items larger than 10′-0 in diameter or square, these items may require field installation of ceramic liners and grouting after splice joints have been welded. The Subcontractor has included this cost as applicable.

1.23 Conveyor trusses will be shipped in nominal 40 foot lengths. Walkways, grating, handrails, idlers, etc., will be shipped as loose items. Support towers and bents will be shipped knocked down.

1.24 ALL BELT SPLICES ARE VULCANIZED AND ARE INCLUDED BY THE SUBCONTRACTOR.

1.25 It is understood that at certain areas of interface within an existing facility requires field fitting and modifications of shop fabricated items.

1.26 The Subcontractor is aware that minor field modifications will be required during the construction of the project. Such field modifications are included in Subcontractor's Scope of Work. The Subcontractor will not be entitled to make claim for any additional payments for said modifications.

1.27 The Subcontractor will be required to submit field manpower schedules, quantity reports, etc., as directed by Roberts & Schaefer Company.

1.28 The Subcontractor has allowed for unloading and placement of electrical items for this project. Hook up will be by the Electrical Subcontractor.

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1.29 The Electrical Subcontractor will place on site, during the Erection Subcontractor mobilization, trailers for electrical storage. It is understood that the Subcontractor will be responsible for the maintenance and protection of all electrical items furnished by Roberts & Schaefer Company.

1.30 Upon Electrical Subcontractor mobilization, all electrical components will become the responsibility of the Electrical Subcontractor after inspection and sign off.

1.31 The Subcontractor has included all labor and materials necessary to install all temporary power service connections from Owner's designated point of distribution to Roberts & Schaefer Company's and Subcontractor's office trailer, equipment, etc.

1.32 Pay special care to the handling and erection of the shop finished painted steel using accessories such as nylon slings, etc.

1.33 Excessive abrasions and carelessness in the handling of finish painted structural steel will be repainted and will be backcharged to the Erection Subcontractor.

1.34 During the course of the project, photograph the various structures in its construction sequence. All photographs shall be properly documented with the date and location. Photographs shall be submitted on a monthly basis to the Roberts & Schaefer Company Project Manager.

1.35 Subcontractor will not use any photographs, or release any information concerning this subcontract, or the project, or any part thereof to any member

of the public, press, business entity, or any official body unless prior written consent is obtained from Roberts & Schaefer Company.

1.36 Submit for review and approval contemplated resumes of all supervisory field personnel on this project. Roberts & Schaefer Company reserves the right to reject and/or have removed any field personnel working on this project at any time.

1.37 Maintain on the project site with Subcontractor's superintendent a copy of the signed Purchase Order including Subcontract Agreement and Certificate of Insurance.

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(B L A N K)

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2. *OWNER SPECIFICATION*

2.1 Sections 4.0 & 5.0 and Appendices A thru E will form an integral part of this contract.

2.2 All general conditions, terms, etc. as specified will be applicable to the Subcontractor.

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(D E L E T E D)

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5. *PROJECT SCHEDULE AND MILESTONE DATES*

Seq. Date	Activity	Start	Completion Date

SEE R&S CONSTRUCTION SCHEDULE PRO- PREVIOUSLY.

5.2 The Subcontractor shall take all the necessary corrective action such as overtime, increased work force, etc. to achieve the milestone dates as listed. Overtime when required to satisfy the stated project dates shall be to the subcontractor's account.

5.3 The Roberts & Schaefer Company Project Manager shall be the sole judge in determining the Project Schedule and Milestone Date efficiency.

5.4 The Project Manager shall order corrective action when deemed appropriate to achieve the Milestone Dates as specified.

5.5 The Subcontractor shall upon notification of corrective action, submit a recovery plan for the Project

Manager's review. Upon approval, the Subcontractor shall implement the plan.

5.6 If in the opinion of the Project Manager, the recovery plan is not submitted or effective, all payments due for previous work performed shall be withheld.

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6. *TERMS AND CONDITIONS OF PURCHASE*

6.1 ACCEPTANCE

6.2 PAYMENTS

6.3 TITLE AND RISK OF LOSS

6.4 INSPECTION

6.5 CHANGES

6.6 WARRANTIES

6.7 TERMINATION

6.8 FORCE MAJEURE

6.9 PATENT COPYRIGHT OR TRADEMARK INFRINGEMENT

6.10 PURCHASES SPECIFICATIONS, TECHNICAL DATA, ETC.

6.11 ASSIGNMENTS AND SUBCONTRACTING

6.12 SPECIAL TOOLING

6.13 INDEMNIFICATION AND INSURANCE

6.14 LAW GOVERNING

6.15 COMPLIANCE WITH LAWS

6.16 ENTIRE AGREEMENT

6.17 SEVERABILITY

6.18 REMEDIES

6.19 PROHIBITED GIFTS

6.20 LICENSES

6.21 WAIVER

6.22 LIENS

6.23 SELLER'S PRESENCE ON SITE

6.24 CO-OPERATION WITH OTHERS

6.25 NON-DISCLOSURE

6.26 AFFILIATED COMPANIES

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6. *TERMS AND CONDITIONS OF PURCHASE* PARTIES. ROBERTS & SCHAEFER COMPANY will be referred to as "Buyer", and the person or Company indicated on the front hereof with whom this order is placed will be referred to as, "Seller". This order may be used to purchase supplies, machinery, equipment, etc. and may also be used to contract for maintenance and construction work for Purchaser including services, repairs, or consulting. All products of work covered by this order, regardless of type, will be referred to as "Items".

6.1 *ACCEPTANCE*

This purchase order must be accepted in writing by Seller. If, for any reason, Seller should fail to accept in writing, any conduct by Seller which recognizes the existence of a contract pertaining to the subject matter hereof shall constitute acceptance by Seller of this purchase order and all of its terms and conditions. Any terms proposed in Seller's acceptance of Buyer's offer which add to, vary from, or conflict with the terms herein are hereby objected to. Any such proposed terms shall be void and the terms herein shall constitute the complete and exclusive statement of the terms

and conditions of the contract between the parties and may hereafter be modified only by written instrument executed by the authorized representatives of both parties. If this purchase order has been issued by Buyer in response to an offer, and if any of the terms herein are additional to or different from any terms of such offer, then the issuance of this purchase order by Buyer shall constitute an acceptance of such offer subject to the express conditions that the Seller assent to such additional and different terms herein and acknowledge between Buyer and Seller with respect to the subject matter hereof and the subject matter of such offer and Seller shall be deemed to have so assented and acknowldeged unless Seller notifies Buyer to the contrary in writing within ten (10) days of receipt of this purchase order.

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6.2 *PAYMENTS*

6.2.1 Discount invoices are payable based on applicable discount periods computed from the date of delivery of the ordered items or the date of receipt of the correct invoice, whichever is later. The price which Seller charges in filing this order shall not be higher than that last charged or quoted to Purchaser for such items (if there has been a previous charge or quotation) unless Buyer expressly agreed otherwise in writing. If Buyer has included a price on the front thereof, such price shall control, subject to the terms and conditions which follow, unless such price exceeds the lowest price at which Seller is selling such items or similar items, in which case the lower price shall control. If there has been no charge or quotation to Buyer for such items previously, and if no price is set forth on the front hereof, Buyer shall have the privilege to return the items, with Seller paying the cost of transportation, if Seller charges a price which is in

excess of the lowest price at which Seller is selling such items. If any anytime prior to the delivery of the items, Buyer is given the opportunity to purchase a portion or all of the items, or similar items of like quality, at a bona fide, competitive price which is less than the price to be charged by Seller hereunder, Buyer, shall so notify Seller. Should Seller fail to meet such lower price within 30 days following the date of Buyer's notice, Buyer may, at its option, purchase from the other source at the lower price, in which event Buyer and Seller shall be relieved of their obligations hereunder in respect to that portion of the items or similar items so purchased from the other source.

6.2.2 Buyer shall pay all properly submitted and accepted invoices within 30 days of receipt. Buyer may withhold all or any part of payment if Seller is not performing work in accordance with the Contract. ALL PAYMENTS SHALL BE LESS TEN PERCENT (10%) RETENTION. RETENTION SHALL BE RELEASED THIRTY (30) DAYS AFTER FINAL COMPLETION OR DELIVERY PENDING ABSOLUTE VERIFICATION FOR COMPLIANCE TO THE CONTRACT AND RESOLUTION OF ANY BACKCHARGES.

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6.3 *TITLE AND RISK OF LOSS*

6.3.1 Title to all items to be delivered hereunder shall remain with Seller until such items are delivered to Buyer at the FOB point specified on the face of this purchase order. All risks of loss or damage to items to be delivered by Seller hereunder shall be upon Seller until title to such items passes to Buyer, but Seller shall bear all risk of loss or damage to items are redelivered to Buyer except for the loss, destruction of, or damages to such re-

jected items resulting from the gross negligence of officers, agents or employees of Buyer acting within the scope of their employment. A packing slip must accompany each shipment. If a shipment is to a consignee or agent of Buyer, a copy of the packing slip shall be forwarded concurrently to Buyer. If no packing slip is sent, the count or weigh reported by Buyer or its agent or consignee is agreed to be final and binding on Seller with respect to such shipment. If material or equipment is furnished by Buyer for performance to this purchase order, all risks of loss or damage to such material or equipment shall be upon Seller until the material and/or the equipment has been redelivered to Buyer Processing of claims relating to loss of or damage to items to be furnished hereunder shall be accomplished by the party unresponsible for risk of loss or damage to such items at the time the claim arises.

6.3.2 For the Equipment furnished under the contract, the title and risk of loss shall pass to Owners upon delivery at site, and Seller agrees that title upon such delivery shall vest in Owner's free and clear of all liens and encumbrances.

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6.4 *INSPECTION*

Notwithstanding (1) any inspection at source by Buyer, (2) the passage of title at the FOB point, or (3) any prior payment, all items are subject to final inspection and acceptance at Buyer's plant. Except as otherwise provided in this purchase order, such final acceptance will be made within a reasonable time after deliver. No inspection or test made prior to final inspection and acceptance shall relieve Seller from any responsibility for defects or other failure to meet the requirement of this purchase order. Unless the items to be de-

livered hereunder are standard commercial items, all items under this purchase order shall comply with specifications listed or referred to herein. Buyer shall have a right to inspect and test all items under this purchase order at all reasonable times and places. Seller shall furnish, without additional charges, reasonable facilities and assistance for safe and convenient inspection or test. If nay item is found to be defective or otherwise not in conformity with the requirements of this purchase order, Buyer, in addition to its other rights, may reject such items or require its prompt correction or replacement at Seller's expense, including shipping and packing charges. If Seller fails to proceed promptly with the replacement or correction of such defective or nonconforming item, Buyer may, by contract or otherwise, replace or correct such items and Seller shall be liable to Buyer for any excess costs thereby incurred by Buyer. Rejected items will not be resubmitted for acceptance without concurrent notice of the prior rejection. In addition to its other remedies, Buyer may charge back to Seller's account the amount paid for the rejected items pending redelivery of same.

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6.5 *CHANGES*

Buyer may, at any time, by written order to Seller, signed by Buyer's authorized representative make changes in any of the following: (1) Shipping and packing instructions, (2) Quantity of products ordered, (3) Drawings and specifications, (4) Delivery schedules, and (5) Place of delivery. Seller shall proceed promptly to make such changes in accordance with the terms of such written order. If such changes causes an increase or decrease in the cost of performance of this purchase order of in the time required for performance, an equitable

adjustment shall be made in the purchase order price and/or the delivery schedule, and this purchase order shall be amended in writing accordingly. Any claim for adjustment under this clause must be asserted within 30 days from the date of the written order. Buyer shall not be obligated to consider Seller's claim for an equitable adjustment resulting from a change. Nothing in this Condition shall excuse Seller from proceeding with the purchase order as changed. Except as may be directed or agreed to in writing by Buyer's authorized representative, Seller shall not make any changes in the shipping and packing instructions, quantity of items ordered, drawings and specifications, delivery, schedules, or any other aspect of the items to be furnished under this purchase order.

6.6 *WARRANTIES*

6.6.1 Seller represents and expressly warrant that all items ordered to specifications will conform thereto and to the drawings, samples or other descriptions furnished by Buyer, or that if no ordered to specifications they will be suitable for the purpose intended and that all items will be of good quality and workmanship and free from defects, and will be free of all liens and encumbrances. Seller shall, at its own expense, promptly replace or correct any items which are defective upon receipt of notice from Buyer, and Seller agrees to proceed with the correction of any such defects in a manner satisfactory to Buyer. Seller shall assume all risks of loss of or damage to items which are to be corrected or replaced pursuant to this warranty from the date on which Seller is notified of the defect or nonconformity until the corrected items or replacements are received at destination designated by Buyer. Alternatively, Buyer may, at its

option, repair such defective items at Seller's expense. Any warranty period shall be deemed to be tolled from the date Seller has been notified to repair or replace defective items until delivery is

made to Buyer of corrected items or replacements. This representation and warranty is jointly and severally enforceable by Buyer and by all persons to whom the items may be sold or transferred, including Buyer's successors, assigns, and customers or users. This warranty shall survive any inspection, delivery, acceptance or payment by Buyer. The amount paid for defective items may be charged back to Seller's account pending redelivery of same.

6.6.2 If Seller is directed by Buyer to repair or replace any defective part and fails to do so within a reasonable time, or if an emergency exists rendering it impracticable for Buyer to have the repair or replacement performed by Seller, or if Seller so requests, Buyer may make or cause to be made such repair or replacement and all costs, including 15% for overhead, incurred therefore shall be deducted from the purchase price or any unpaid portion thereof; or, if the entire purchase price has been paid or the unpaid portion thereof is insufficient to cover such costs, then Seller shall reimburse Owners in full or in part as the circumstances may require.

6.6.3 No payment shall be allowed for any defective part of portion of the design, equipment, materials or workmanship until same have been remedied by Seller at its expense and to the satisfaction of Buyer.

6.6.4 Any proposed correction or alteration by Seller of the equipment, materials or workmanship or parts thereof involving patching, cutting, welding or the like, shall be called to the attention of an

be approved by Buyer before such correction or alteration is undertaken.

6.6.5 Buyer, whether by its approval of repairs performed by Seller to defective parts, or by the making of such repairs itself or others or by its acceptance of replacements for such parts, shall assume no responsibility for the proper operation of the design, equipment, materials or workmanship and such approval, repair or acceptance shall not constitute a waiver by Buyer of any provision of the Contract.

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6.7 *TERMINATION*

6.7.1 Buyer shall have the right to terminate this order upon the occurrence of any of the following events: Seller's insolvency or actions indicating insolvency such as the filing of a petition by or against Seller under any chapter of the bankruptcy laws; the appointment of a receiver for Seller, or Seller's attempt to make a general assignment for the benefit of creditors. Upon notification, Seller will have five (5) days to remove unskilled personnel, or Buyer may terminate the order due to Seller's failure to use properly skilled personnel; Seller's failure to make prompt payment to any subcontractors it may have; Seller's failure to make prompt payment for any materials, labor or any other expenses it incurs in the production or construction of the items; or Seller's failure to comply with any of its obligations under this order.

6.7.2 Upon termination of the order in accordance with this section, Buyer may take possession of the items in whatever stage of completion they may be, contract with or employ any other person or persons to finish the items, and collect from Seller any additional expenses or damages, including attorney's fees, which Buyer may suffer. Buyer reserves the right to terminate this purchase order or any part thereof for the sole convenience of

Buyer, by written or telegraphic notice signed by Buyer's Authorized representative.

6.7.3 If Buyer has indicated on the front of this order a completion date or a date upon which the items are to be delivered to Buyer at the location set forth on the front hereof, Buyer reserves the right to cancel this order and recover damages if said date is not met or if prior to said date, Buyer reasonably believes that said date will not be met. If such ~~a~~ delivery or completion date is not so specified on the front of this order a reasonable time will be allowed. Time is of the essence of this purchase order. Seller shall continue performance of this purchase order to the extent not terminated.

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6.8 *FORCE MAJEURE*

In the event of causes beyond the control of Buyer, including but not limited to acts of God, fire, the elements, strikes or labor disputes, and accidents or transportation difficulties, which would make it unreasonable in Buyer's judgment to accept delivery hereunder, Buyer shall have the option to cancel this purchase order or to delay the delivery or completion of all or part of the items, such cancellation or delay being without cost to Buyer.

6.9 *PATENT, COPYRIGHT OR TRADEMARK INFRINGEMENT*

PATENT, COPYRIGHT OR TRADEMARK INFRINGEMENT. Seller shall indemnify Buyer against and hold Buyer harmless for any and all claims for infringement or any patent, copyright, trademark or tradename by reason of the manufacture installation. Seller shall indemnify Buyer for any costs, expenses, liability and damages, including attoreny's fees, which Buyer may incur by reason of any suit or calim or any alleged infringe-

ment. Immediately upon receipt from Buyer of written notice of any such suit or claim, Seller shall appear and assume the defense of the litigation if Buyer shall so request.

6.10 *BUYER'S SPECIFICATION, TECHNICAL DATA, ETC.*

Any specifications, drawings, notes, instructions, engineering notices, or technical data of Buyer furnished to Seller or referred to in this order shall be deemed to be incorporated herein by reference the same as if fully set forth. Buyer shall, at all times, retain title to all such documents, and Seller shall not disclose such to any party other than Buyer of a party duly authorized by Buyer. Upon Buyer's request, Seller shall promptly return to Buyer all such documents and copies thereof.

6.11 *ASSIGNMENTS AND SUBCONTRACTING*

This order and any payment to be made hereunder may not be assigned or transferred without prior written approval by Buyer's authorized representative, nor shall any substantial part of the work (items) to be performed be subcontracted or performed by others without the prior written consent of authorized representative. No invoices may be rendered by others than the named Seller without the written permission of Buyer's authorized representative Purchasing. Upon proper notification and tryful resolution, any claims for

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monies due or to become due from the Buyer shall be subject to deduction by the buyer for any setoff or counterclaim arising out of this or any other purchase orders with the Seller whether such setoff or counterclaim arose before or after such assignment by the Seller. Consent by Buyer to any such assignment, subcontracting or other dis-

position shall not relieve Seller of full responsibility for the Work to be performed.

6.12 *SPECIAL TOOLING*

All special tooling, the cost of which is included in the price of this purchase order, whether designed by Seller, by Buyer, or by a third party, shall become upon acquisition or manufacture the property of Buyer. Seller shall deliver such special tolling to Buyer or Buyer's designee after performance is completed thereunder, unless such special tooling is needed to fill further orders from Buyer and retention by Seller of special tooling has been consented to in writing by Buyer signed by Buyer's authorized representative. The term "special tooling" shall include, but not limited to, all tools. dies, jigs, fixtures, molds, patterns, special taps, special gauges, special test equipment, other special equipment, other special equipment and manufacturing aids, and replacements thereof, acquired or manufactured by Seller for the performance of this purchase order, which are of such a specialized nature that, without substantial modification or alteration, their use is limited to the production of items or parts hereof, or the performance of such services (items) as are to be supplied to Buyer hereunder.

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6.13 *INDEMNIFICATION AND INSURANCE*

Seller shall protect, defend, indemnify and hold harmless Buyer, its agents, consignees, employees representatives from and against all expenses, losses, claims, demands, or causes of action of whatever kind, including negligence, breach of express or implied warranty, failure to warn, or strict liability, and from and against all special, indirect, incidental, or consequential damages, in-

cluding lost profits, of every kind whatsoever arising out of, by reason of, or in any way connected with, accidents, occurrences, injuries or losses to or of any person or property, including Buyer or Buyer's property, which may occur before or after acceptance of the completed items by Buyer, in any way due or resulting from in whole or in part, the design, preparation, manufacture, construction, completion, warning or failure to warn, delivery or nondelivery of items, including such as are caused by any Subcontractor or Seller. Immediately upon receipt from Buyer of written notice of any suit or claim relating to any risk described in the first paragraph of this section and upon written request by Buyer, Seller shall assume the defense of the litigation. In any event, Seller shall pay for or reimburse Buyer for all costs and expenses, including attorney's fees, arising out of any suit or claim relating to any risk described herein. If requested by Buyer, Seller shall maintain policies of liability insurance, declaring Buyer as a named insured, in such amounts as Buyer shall designate, to protect Buyer from all the risks not be cancelable except upon ten (10) days written notice to Buyer. Seller shall furnish proof of such insurance to Buyer. Seller agrees to make prompt written reports to the insurance company involved of all accidents, occurrences, injuries or losses which may occur, and of any and all claims made against Buyer or Seller under said policies of insurance and to send copies of such reports to Buyer within twenty-four hours of the time that Seller make its report to the insurance company.

6.14 *LAW GOVERNING*

This purchase order and all disputes between the parties hereto shall be governed by and construed according to the laws of Illinois whose Circuit

Courts shall have exclusive jurisdiction to determine all such issues.

6.15 *COMPLIANCE WITH LAWS*

Seller warrants that the items and their installation or completion shall not violate or cause Buyer to be in violation of any federal, state or local laws, regulations and orders. Without limiting the foregoing, Seller certifies that the items will be produced and work performed in compliance with such laws, regulations or orders, and Seller agrees to be bound by all such laws, regulations and orders.

6.16 *ENTIRE AGREEMENT*

This document shall be deemed to contain the entire agreement between Buyer and Seller and to constitute the complete and exclusive expression of the terms of the agreement, all prior or contemporaneous written or oral agreements or negotiations with respect to such terms as are included herein or are the subject matter hereof being merged herein.

6.17 *SEVERABILITY*

In the event that any words, phrase, clause, sentence, or other provision hereof shall violate any applicable statute, ordinance, or rule of law in any jurisdiction in which it is used, such provision shall be ineffective to the extent of such violation without invalidating any other provision hereof.

6.18 *REMEDIES*

Buyer's remedies shall be cumulative and remedies herein specified to not exclude any remedies allowed by law. Waiver of any breach shall not constitute waiver of any other breach of the same

or any other provision. Acceptance of any items or payments therefore shall not waive any breach.

6.19 *PROHIBITED GIFTS*

Buyer shall be entitled to terminate its order at any time and without any penalty whatsoever in the event that Buyer receives information indicating that in connection with the solicitation or placement of any business with Buyer, Seller has given any agent or employee of Buyer any compensation, gratuity, gift, renumeration or prerequisite of any kind whatsoever of other than nominal advertising value.

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6.20 *LICENSES*

Seller will obtain and pay for any licenses, permits, and inspections by public bodies required in connection with the items.

6.21 *WAIVER*

Buyer's failure to insist on performance of any of the terms of conditions herein or to exercise any right or privilege or Buyer's waiver of any breach hereunder shall not thereafter waive any other terms, conditions, rights or privileges.

6.22 *LIENS*

Seller shall neither file nor cause to be filed any lien with respect to the Work to be performed or Equipment furnished hereunder and hereby waives any right to file or cause such a lien to be filed. In the event any claim has been asserted against Seller or Buyer or Owners or any lien has been filed with respect to the Work or Equipment, further payment shall not become due until all such claims or liens have been satisfied, released and/or discharged without cost or expense to Buyer or

Owner. Buyer may, in default of Seller so to do, procure the release, satisfaction and discharge of any such claim or lien and deduct all monies paid to release or discharge such claim or lien, including the cost and expense thereof, from any money due or to become due hereunder; or, if final payment has been made, Seller shall claim or lien, including the cost and expense thereof. Seller, in its subcontracts and agreements with suppliers, shall require all subcontractors and suppliers to comply with the above obligations, including the waiver of the right to file liens.

6.23 *SELLER'S PRESENCE ON SITE*

In the event Seller performs Work at the Site for any purpose (except the delivery of Equipment), including, but not limited to, technical services in the erection of Equipment, assistance and/or observation of Equipment performance tests, or on-site warranty work, Seller agrees to the following:
6.23.1a

Seller shall furnish and maintain for itself and its subcontractors at all times during the performance of services:

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6.23.1a.(i)

Coverage of the legal liability of the Seller and its subcontractors under the worker's compensation and occupational disease law of the state in which the Work is to be performed. Where required by statute, employer's liability coverage in an amount not less than $100,000 for each accident shall be included. If Seller is a legally permitted and qualified self-insurer in the state in which the Work is to be performed, it may furnish proof that it is such a self-insurer in such

state in lieu of submitting a certificate of insurance.

6.23.1.a(ii)

Comprehensive general liability insurance with bodily injury limits of not less than $500,000 each person/$1,000,000 each occurrence, including coverages for products/completed operations hazard and for contractual liability.

6.23.1.a(iii)

Comprehensive general liability insurance with broad form property damage limits of not less than $500,000 each occurrence/$1,000,000 aggregate, including coverages for products/completed operations hazard and contractual liability.

6.23.1.a(iv)

Contractual liability insurance in an amount not less than: (a) $500,000 each person/$1,000,000 each occurrence, for bodily injury, including death, and (b) $500,000 each occurrence/$1,000,000 aggregate, for damage to or destruction of property.

6.23.1a(v)

Comprehensive automobile liability insurance with bodily injury limits of not less than $500,000 each person/$1,000,000 each occurrence and property damage limits of not less than $500,000 each occurrence.

6.23.1a(vi)

A $1,000,000 Combined Single Limit (Bodily Injury and Property Damage) is an acceptable alternative to the separate Bodily

Injury and Property Damage limits stated in 6.23.1a(ii) through 6.23.1a(v) above.

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6.23.1a(vii)

Applicable if the Seller of its subcontractors will use helicopter or airplane for any reason at the Site or to perform any obligations contracted for herein. Aircraft public liability (including passenger liability) insurance with a minimum combined limit for bodily injury and property damage of $10,000,000 each occurrence. Such policy shall be in effect prior to the first use of such aircraft and shall continue in effect, at all times, until after such aircraft completes its work and lands at its final destination.

6.23.2

The policies required in this Article 6.23 shall be endorsed to name the Owners and Buyer, their directors, officers, employees and agents as additional insurers or the Seller may obtain for the Owners and Buyer an Owner's Protective Liability policy as an alternative method of extending coverage. The Seller shall furnish and maintain the insurance policies listed in this article for itself and its subcontractors. The Seller will not be permitted to bring its employees, materials, or equipment on the Site until Buyer receives from the Seller an acceptable Certificate of Insurance covering the terms of Section 6.23.1.a.

The Seller shall not use a helicopter or airplane until Buyer receives from the Seller an acceptable Certificate of Insurance covering

the terms of Section 6.23.1.a(vii). The Seller shall be from an insurance carrier acceptable to Buyer. Such certificates shall state that the insurance carrier has issued the policies providing for the insurance specified herein, that such policies are in force, and that the insurance carrier will give Buyer thirty days prior written notice of any material change in, or cancellation of, such policies. If such insurance policies are subject to any exceptions to the terms specified herein, such exceptions shall be explained in full in such certificates. Buyer may, at its discretion, require the Seller to obtain insurance policies that are not subject to any exceptions.

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6.23.3

Buyer shall be notified of any policies maintained by the Seller under Article 6.23 and written on a "Claims-Made" form. Copies of any "Claims-Made" form policies shall be provided to Buyer along with the notification. Buyer may, at its discretion, require the Seller to institute measures to guarantee future coverage for claims as contemplated by this Contract.

6.23.4

If Seller elects to perform Work at the Site with Seller's own employees, Seller agrees to comply with any existing local labor agreement and/or affiliation applicable to the Site.

6.24 *COOPERATION WITH OTHERS*

6.24.1

Buyer may undertake other Work or award other contracts for portions of related Work

that are not included as part of the Work herein. The Seller shall properly fit, connect, and coordinate its work with that of Buyer and other contractors. The Seller shall not commit or permit any act that will interfere with the performance of Work by others.

6.24.2

Where the proper execution or result of the Seller's Work depends on the timely and proper completion of work by others, the Seller shall report any defect or deficiencies in such other work that render it unsuitable for the Seller to properly execute the Work included herein. Such information shall be reported to Buyer immediately and confirmed in writing within 24 hours. Failure to report such deficiencies shall constitute acceptance of the conditions by the Seller.

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6.25 *NON-DISCLOSURE*

Except as required by law, regulation, or judicial or administrative order, there shall be no disclosure of the terms of this Contract without the consent of all the parties hereto.

6.26 *AFFILIATED COMPANIES*

Any indemnification of Owner or Purchaser, or any limitation of Owner's or Buyer's liability which is made or granted under this Contract shall to the same extent apply to any of the Owner's or Buyer's affiliated companies including any officers, directors, employees, or agents thereof.

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7. *LIENS AND WAIVERS*

7.1 Seller shall neither file nor cause to be filed any lien with respect to the Work to be performed or

Equipment furnished hereunder and hereby waives any right to file or cause such a lien to be filed. In the event any claim has been asserted against Seller or Buyer or Owners or any lien has been filed with respect to the Work or Equipment, further payment shall not become due until all such claims or liens have been satisfied, released and/or discharged without cost or expense to Buyer or Owner.

7.2 Buyer may, in default of Seller so to do, procure the release, satisfaction and discharge of any such claim or lien and deduct all monies paid to release or discharge such claim or lien, including the cost, attorney's fees and expense thereof from any money due or to become due hereunder; or, if final payment has been made, Seller shall reimburse Buyer for all monies paid to discharge any such claim or lien, including the cost, attorney's fees and expense thereof. Seller, in its subcontracts and agreements, shall, in writing, require all subcontractors and suppliers to be bound by the above obligations, including the waiver of the right to file liens.

7.3 As a condition for payment due, Seller must submit to Buyer with its pay request or invoice-voucher a written waiver of lien and a written waiver of lien of all of its sub-contractors and suppliers for the full amount of the requested payment, whether partial or final payment.

7.4 Seller must also submit a affidavit listing the names of its suppliers and subcontractors showing the amount of their contract and the amount they then claim due them.

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(DELETED)

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9. *SUBCONTRACTOR SUPPLIED MATERIALS*

9.1 The following materials including all miscellaneous consumable will be furnished by the Subcontractor:

A. Vulcanized Belt Splices

B. All Foundation Materials

C. All Cold Weather Protection

D. Concrete Block Walls and Wall Reinforcing Steel

E. Lintels and Roof Decking

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(DELETED)

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11. *EXTRA WORK*

11.1 If, during the life of the contract, the Owner, and/or Buyer desires the Seller to perform extra work, the Seller will be notified in writing. Seller shall perform such work in accordance with the provisions of the contract and shall pay Seller at the option of Owner/Buyer as outlined in I or II below. All percentages and rate schedules shall be firm for the life of this contract.

11.2 Buyer's Construction Manager shall sign all extra work time sheets. This signature shall not be misconstrued to represent Buyer's approval, but rather verification that work was performed with the stated equipment and manpower. Buyer's Project Manager shall be the sole judge in the definition of chargeable extra work.

11.3.I. Negotiated Lump-Sum Price. The lump sum price proposed by the Seller shall be developed and complete documentation on the lump sum

price shall be made available to Buyer upon request.

11.3.II. On a Cost-Reimbursable Basis. In the event the Seller is to be paid on a cost-reimbursable basis, Seller shall be reimbursed for only the following items on the basis indicated:

11.4	*Item*	*Basis for Reimbursement*
11.4.1	Straight-time Field Labor	Per Wage Rates
11.4.2	Premium-time Field Labor	Per Wage Rates
11.4.3	Construction equipment and large tolls owned by Seller.	At the rates listed under Equipment Rates include overhead and profit, fuel and lubricants. Charges shall only be for equipment actually used.
11.4.4	Construction equipment and large tolls rented from a third party.	At actual cost including fuels, lubricants and any applicable excise tax, plus 10% of such actual cost. The rental of construction equipment and large tools shall be subject to Buyer's prior written approval.

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11.4.5	Materials or (See Attachments B1 and B2)	At actual cost including any applicable excise tax plus 10% of such actual cost for materials purchased by the Seller. Consumable supplies are not reimburseable under this item.
11.4.6	Subcontracts	At actual cost plus 10% of such actual cost subject to Buyer's prior written approval. Such percent shall cover the facilities provided to subtier subcontractors, field administration, etc. Seller shall obtain from its subtier subcontractors and provide Buyer agreements regarding extra work consistent with the provisions as listed herein.

11.5 Administration

11.5.1 Seller shall submit separate Request for Change Order for each item of Extra Work and all Request for Change Orders shall be subject to Buyer audit.

11.5.2 For extra work performed on a cost-reimbursable basis, Seller shall submit daily time sheets to Buyer not later than the next working day after the day the work is performed. Time sheets shall include all charges for which Seller is to be paid. Seller shall not be paid for charges on time sheets which are submitted to Buyer after this time.

11.5.3 In addition, submit with all invoices for cost-reimbursable work all related material costs, payroll ledgers, equipment rental costs, etc.

11.6 Wage Rates for Extra Work

11.6.1 The Wage Rates listed below apply for Extra Work performed on a cost reimbursable basis. Rates shall include base rates and fringe benefits which include insurance, taxes, overhead and profit.

11.6.2 Wage Rates SEE ATTACHMENT "A"

ATTACHMENT "A"

Merit's U.M.W. Cost Plus Rates

for

Surface Construction Hourly Rates

Through 9/30/93

Grade A	$39.67
Grade B	$38.77
Grade C	$34.95
Grade D	$32.45
Grade E	$29.54
Supervision	$43.00

All Rates:

Include Taxes, Fringes, Insurances, Overhead and Mark-up.

Premium Time:

Time and a Half .....@ 1.40 times the above rates
Double Time .....@ 1.75 times the above rates
Triple Time .....@ 2.50 times the above rates

ATTACHMENT B1

1. *CONCRETE* In place including design, forming, materials placing and finishing, excluding reinforcing and excavation.

a. Spread Footing	$220.00/CY
b. Slab on Grade	$240.00/CY
c. Elevated Floor	$260.00/CY
d. Grade Walls	$345.00/CY
e. Structural Concrete	$280.00/CY
f. Equipment Foundations	$280.00/CY
2. Reinforming Steel in place	$ .62/LB
3. Welded wire fabric in place 6 x 6 6/6	$.34 SQ FT.

EXCAVATION Including disposal of excess

Common	Bulk, Site	$ 2.50/CY
Structural		$ 10.00/CY
Rock		$ 25.00/CY
Select Backfill	2A Stone	$ 40.00/CY

STEEL and touch-up paint

Structural Steel—on grade conveyors	$ .45/LB
Structural Steel—conveyor truss	$ .41/LB
Structural Steel—conveyor bents	$ .50/LB
Structural Steel—columns, beams	$ .50/LB
Structural Steel—braces and light members	$ .55/LB
Miscellaneous Steel—toe plates, ladders, handrail, etc.	$ .60/LB
Plate work—mild steel	$ .46/LB
Astralloy "V" Liner	$ .39/LB
Stainless Steel 304	$ .70/LB
Ceramic Liner 1/2"	$ 10.00/SF

Ceramic Liner 1"	$ 12.50/SF
Ceramic Liner 2"	$ 15.00/SF
Galvanized Bar Grating 1 1/4" x 3/16"	$ 6.50/SF
Galvanized Stair Treads	$ 11.25/EA
Machinery Doors	$ N/A/EA
#4 Expanded Metal Grating Galvanized	$ 4.50/SF
Checkered Steel Floor Plate 1/4"	$ .45/SF
Roofing (Uninsulated)	$ 1.60/SF
Conveyor Hood Cover	$ 1.60/SF
Conveyor Spillage Guards	$ 1.50/SF

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12. *EQUIPMENT RATES*

12.1 The equipment rates as listed below shall apply for Extra Work performed on a cost reimbursable basis. Rates for equipment are on a maintained basis and include fuel, lubricants, taxes, overhead and profit.

T & M Hourly Equipment Rates

(without operator)

	Equipment Description	Hourly	Fuel	Total
AT 10	Articulating Dump 4 x 4 25 Ton	$61.50	7.5	$69.00
C-1	50 Ton Grove Crane	$90.00	5.0	$95.00
D-1	TD-7E Dozer	$22.00	4.0	$26.00
D-2	TD-25E Dozer	$62.00	13.0	$75.00
D-3	D-6 Dozer	$57.75	8.0	$65.75
D-8	D-8 Dozer	$62.00	13.0	$75.00
E-1	EL-180 Crawler	$44.00	7.0	$51.00
E-4	300 Komatsu Crawler	$77.75	9.0	$86.75

	Equipment Description	Hourly	Fuel	Total
G-1	Cat 12 Grader	$20.00	4.0	$24.00
H-2	580 E Backhoe	$23.00	3.0	$26.00
H-3	580 K Extend-a-hoe	$25.00	3.0	$28.00
L-3	953 Trackholder	$38.50	8.0	$46.50
P-8	TS-18 Pan Terex	$76.00	17.0	$90.00
R-2	Bomag Roller 27,000 lbs.	$26.50	2.0	$28.50
RD-1	Rock Dump—Tandem	$10.00	3.0	$13.00
S-1	Skid Steer Loader	$14.00	3.0	$17.00
TD-2	Dump Truck 10 Ton	$ 5.00	3.0	$ 8.00
TT-1	Truck Tractor R-600 with 50 Ton Lowboy Trailer and Driver			$70.00

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13. *BACKCHARGES*

13.1 If, under the provisions of this contract, the Seller is notified by Buyer to correct defective or non-conforming work, and Seller states or by its actions indicates that it is unable or unwilling to proceed with corrective action in a reasonable time, Buyer and/or Owner may upon written notice, proceed to accomplish the redesign, repair, rework or replacement of nonconforming work by the most expeditious means available and backcharge Seller for the costs incurred.

13.2 The costs of backcharge work shall include:

(a) Incurred labor costs including all payroll additives.

(b) Incurred net delivered material costs.

(c) Incurred Subcontractor costs directly related to performing the corrective action.

(d) Equipment and toll rentals at prevailing rates in the jobsite area.

(e) A 15% factor applied to the total of items (a), (b), (c) and (d) for Roberts & Schaefer Company's overhead, supervision and administrative costs.

13.3 The backcharge notice will request Seller's approval for Buyer to proceed with the required work. However, failure of Seller's grant such approval shall not impair Buyer's right to proceed with the work under this or any other provision of this contract.

13.2.4 Buyer shall separately invoice or deduct from payments, otherwise due to Seller the costs as provided herein. Buyer's right to backcharge is in addition to any and all other rights and remedies provided in this contract or by law. The performance of backcharge work shall not relieve Seller of any of its responsibilities under this contract including but not limited to express or implied warranties, specified standards for quality, contractual liabilities and indemnifications, and the contract schedule.

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14. *SPECIAL PROVISIONS*

All work will be executed under R&S supervision.

PARTIAL
WAIVER OF LIEN TO DATE

Roberts & Schaefer Company
Purchase Order No. 9331-711

STATE OF PENNSYLVANIA)
) ss
COUNTY OF WASHINGTON)

TO WHOM IT MAY CONCERN:

Whereas the undersigned has been employed by ROBERTS & SCHAEFER COMPANY to furnish UMWA construction services for Raw Coal Storage and Handling Facility for the premises known as the Somerset Prep. Plant of which Eighty-Four Mining Co. is the Owner.

The undersigned, for and in consideration of

($————————) Dollars, and the good and valuable considerations, do (conditioned upon receipt of said amount) hereby waive and release any and all lien or claim or right of lien under any law, common or statutory, relating to Mechanic's liens, on the above described premises and improvements thereon, and on the monies or other considerations due or to become due from the owner, on account of labor or services, material, fixtures or apparatus heretofore furnished to this date by the undersigned for the above described premises.

Given under MY (OUR) hand(s) and seal(s)

this ——— day of ————————, 19——.

(Affix Corporate Seal Here)

————————————————
(Name of Manufacturer, Materialman or Subcontractor)

ATTEST: _____
Signature of Secretary of Corporation

BY: _____
(Signature of Sole Owner or of Authorized Representative of Corporation or Partnership)

TITLE: _____

NOTE: All waivers must be for the full amount paid. If waiver is for a corporation, corporate name should be used, corporate seal affixed and title of officer signing waiver should be set forth; if waiver is for a partnership, the partnership name should be used, partner should sign and designate himself as partner.

As stated above, this waiver is null and void in the event the undersigned does not receive the amount set forth herein.

CONTRACTOR'S AFFIDAVIT

STATE OF)
) ss
COUNTY OF)

TO WHOM IT MAY CONCERN:

THE undesigned, being duly sworn, deposes and says that he is ———————— of the ———————— who is the contractor for the Raw Coal Storage and Handling Facility work on the site known as the Somerset Prep. Plant owned by Eighty-Four Mining Co. That the total amount of the contract including extras is $———— on which he has received payment of $———— prior to this payment. That all waivers are true, correct and genuine and delivered-unconditionally and that there is no claim either legal or equitable to defeat the validity of said waivers. That the following are the names of all parties who have furnished material or labor, or both, for said work and all parties having contracts or sub contracts for specific portions of said work or for material entering into the construction thereof and the amount due or to become due to each, and that the items mentioned include all labor and material required to complete said work according to plans and specifications:

Names	What for	Contract Price	Amount Paid	This Payment	Balance Due
Total Labor and Material to Complete					

That there are no other contracts for said work outstanding, and that there is nothing due or to become due to any person for material, labor or other work of any kind done or to be done upon or in connection with said work other than above stated.

Signed this ——— day of ————————, 19——.

Subscribed and sworn to before me this ———— day of

————————, 19——.

FINAL
WAIVER OF LIEN

Roberts & Schaefer Company
Purchase Order No. 9331-711

STATE OF PENNSYLVANIA)
) ss
COUNTY OF WASHINGTON)

TO WHOM IT MAY CONCERN:

Whereas the undersigned has been employed by ROBERTS & SCHAEFER COMPANY to furnish UMWA construction services for Raw Coal Storage and Handling Facility for the premises known as the Somerset Prep. Plant of which Eighty-Four Mining Co. is the Owner.

The undersigned, for and in consideration of

($————————) Dollars, and the good and valuable considerations, do (conditioned upon receipt of said amount) hereby waive and release any and all lien or claim or right of lien under any law, common or statutory, relating to Mechanic's liens, on the above described premises and improvements thereon, and on the monies or other considerations due or to become due from the owner, on account of labor or services, material, fixtures or apparatus heretofore furnished to this date by the undersigned for the above described premises.

Given under MY (OUR) hand(s) and seal(s)

this ——— day of ————————, 19——.

(Affix Corporate Seal Here)

_____
(Name of Manufacturer, Materialman or Subcontractor)

ATTEST: _____
Signature of Secretary of Corporation

BY: _____
(Signature of Sole Owner or of Authorized Representative of Corporation or Partnership)

TITLE: _____

NOTE: All waivers must be for the full amount paid. If waiver is for a corporation, corporate name should be used, corporate seal affixed and title of officer signing waiver should be set forth; if waiver is for a partnership, the partnership name should be used, partner should sign and designate himself as partner.

As stated above, this waiver is null and void in the event the undersigned does not receive the amount set forth herein.

CONTRACTOR'S AFFIDAVIT

STATE OF)
) ss
COUNTY OF)

TO WHOM IT MAY CONCERN:

THE undesigned, being duly sworn, deposes and says that he is ———————— of the ———————— who is the contractor for the Raw Coal Storage and Handling Facility work on the site known as the Somerset Prep. Plant owned by Eighty-Four Mining Co. That the total amount of the contract including extras is $———— on which he has received payment of $———— prior to this payment. That all waivers are true, correct and genuine and delivered unconditionally and that there is no claim either legal or equitable to defeat the validity of said waivers. That the following are the names of all parties who have furnished material or labor, or both, for said work and all parties having contracts or sub contracts for specific portions of said work or for material entering into the construction thereof and the amount due or to become due to each, and that the items mentioned include all labor and material required to complete said work according to plans and specifications:

Names	What for	Contract Price	Amount Paid	This Payment	Balance Due
Total Labor and Material to Complete					

That there are no other contracts for said work outstanding, and that there is nothing due or to become due to any person for material, labor or other work of any kind done or to be done upon or in connection with said work other than above stated.

Signed this ——— day of ————————, 19——.

Subscribed and sworn to before me this ———— day of

————————, 19——.

SUB-CONTRACT AGREEMENT

This AGREEMENT, made this SECOND day of NOVEMBER 1993 between MERIT CONTRACTING, INC. (hereinafter designated "Subcontractor"), and ROBERTS & SCHAEFER COMPANY, (hereinafter designated "Contractor").

WITNESSETH: That Subcontractor agrees as follows:

Article I. The word "Work" shall mean all the work, materials, matters and things required to properly complete in place, all items to be done by the Subcontractor under this agreement.

The word "Owner" shall mean

EIGHTY-FOUR MINING CO.

The word "Engineer" shall mean

ROBERTS & SCHAEFER CO.

Article II. Subcontractor agrees to furnish all labor, supervision, materials, equipment. scaffolding, hoist, transportation, handling, and tests necessary to expedite and complete in place the Work described as follows:

FURNISH UMWA CONSTRUCTION SERVICES AND CERTAIN MATERIALS FOR THE RAW COAL STORAGE AND HANDLING FACILITY.

all as shown on the drawings and/or called for by the specifications, alternates, and addenda thereto, identified as follows:

SEE R&S P.O. #9331-711

and including the GENERAL CONDITIONS. These drawings, specifications, addenda, and general conditions shall be considered as part of this agreement. Work shown on drawings though not mentioned in specifications, or described in specifications and not shown on drawings, shall be executed as part of this agreement.

Article III. The sum to be paid by Contractor to Subcontractor for the Work shall be ONE MILLION SEVEN HUNDRED AND SEVENTY-FIVE THOUSAND dollars. ($1,775,000.00), subject to additions and deductions as herein provided, which sum is herein referred to as the "Price".

Article IV. Subcontractor agrees to proceed at once with the preparation of material, to begin the Work when notified so to do, and to complete fully the Work PER R&S CONSTRUCTION SCHEDULE PROVIDED (or such other dates as may be fixed pursuant to Articles V or IX hereof.)

It is agreed that time is of the essence and that payment of the Price is conditioned upon completion of the Work as specified. Subcontractor agrees to cooperate with Contractor and all other Subcontractors and to provide all necessary labor, materials, apparatus, and services to insure completion of the Work at the time agreed upon.

Article V. Should Subcontractor be delayed by the act, neglect, or default of Contractor, Owner or Engineer, or of any other subcontractors employed by Contractor or Owner upon the premises, or by any damage or casualty for which Subcontractor is not responsible, or by strikes beyond Subcontractor's control, then the time for completion of the Work shall be extended for a period equivalent to the time lost by reason of the causes aforesaid. No extension shall become operative unless a claim is presented in writing to Contractor within forty-eight (48) hours of the beginning of delay, and such claim is approved in writing by Contractor. Subcontractor agrees that such extension of time precludes, satisfies, and cancels all other claims on accont of such delay. In no event shall Contractor be liable for any costs or damages whatsoever by reason of any delay suffered by Subcontractor.

Permitting Subcontractor to continue after the time to complete the Work has expired shall not be construed as

a waiver of damages for noncompliance with the time clause.

Contractor may order Subcontractor to work overtime, and it is agreed that Contractor is to pay only the actual cost of labor over the regular rates plus the actual amount of taxes and contributions required by law. Should it be necessary, in the opinion of Contractor, for Subcontractor to work overtime due to failure on Subcontractor's part to keep up with the general progress of the structure, then Subcontractor shall work overtime and the entire cost and expense so incurred shall be borne by Subcontractor.

Subcontractor shall provide sufficient skilled labor to properly man the work, irrespective of wage rate, or irrespective of any increased compensation paid to the men, no matter what form such compensation may take.

Should Subcontractor fail to make deliveries of material, thereby causing or threatening to cause delay, Contractor shall have the right to expedite deliveries; all expenses incurred by Contractor on this account shall be borne by Subcontractor.

Article IV. If a petition in bankruptcy is filed by or against Subcontractor and/or if a receiver, trustee, assignee, or other custodian of the business, affairs, or properties, or any portion thereof, of Subcontractor is appointed, or if Subcontractor is a partnership and said partnership is dissolved, or if Subcontractor is an individual and shall die or be adjudicated incompetent, or if Subcontractor is a corporation or association and same is dissolved, or should Subcontractor, in the opinion of Contractor, at any time refuse or neglect to apply enough properly skilled workmen, or materials of a proper quality, or fail in any respect to prosecute the Work, or fail in the performance of any of the agreements herein contained, then Contractor, at its option, at any time after serving upon Subcontractor a two days' written notice may terminate this agreement and/or provide such labor

and/or materials and/or services and shall deduct the cost thereof from any money then due or thereafter to become due to Subcontractor. In such event Contractor shall have the right to take possession, for the purpose of completing the work, of all the materials, tools, and appliances belonging to Subcontractor, and, if necessary, provide additional funds to cover cost of completing the Work, to sell said-materials, tools and appliances at market prices and credit the proceeds to the cost thereof. Contractor may employ any other person or corporation to finish the Work and to provide the materials therefor. In any of such events Subcontractor shall not receive any further payments until the entire structure shall be wholly finished at which time if the unpaid balance of the Price shall exceed the expense (including 10% for Contractor's overhead expense) incurred by Contractor in finishing the Work, such excess shall be paid by Contractor to Subcontractor, but if such expense plus 10% to cover Contractor's overhead expense shall exceed such unpaid balance, Subcontractor shall pay the difference to the Contractor. Nothing in this Article shall be construed as limiting the remedy of Contractor to the provisions hereof, and failure of Contractor to avail itself of the rights hereunder shall not operate as a waiver of any rights obtaining under this agreement.

Article VII. The Work is to be done to the satisfaction of the Engineer and Contractor, and the decision of Engineer as to the construction and meaning of the drawings, specifications, and addenda and the character of the Work shall be final. Subcontractor agrees to furnish Contractor with list of drawings to be used in the Work, dates when the same will be required, and any other information necessary to perform the Work within the time specified. No extension of time will be allowed by reason of Subcontractor not being furnished with drawings, details, or other information unless request therefor is made to Contractor in writing and Contractor fails to furnish the same within a reasonable time. Subcontractor shall prepare and submit to Contractor for written approval, all

shop drawings and details required to properly fabricate and install the Work, and no items shall be fabricated or installed prior to receipt of such approval. Submission of shop drawings shall be made in ample time for meeting Contractor's time schedule. Subcontractor shall furnish blueprints of shop drawings in sufficient number to meet Contractor's requirements.

Subcontractor shall be responsible for the construction, maintenance, dismantling and use of all his equipment, apparatus, materials, supplies, etc. including damage thereto by fire or any other damage or destruction by any other peril including acts of God. Temporary power supply for general purposes will be furnished by Contractor, but Subcontractor shall furnish portable or special power equipment as may be necessary for the execution of the Work. Subcontractor shall clear away all dirt and rubbish caused by its operations as often as requested by Contractor, and shall leave the structure and premises at the completion of the Work in a neat and clean condition. Subcontractor shall do all cutting and patching necessary to make the Work match that of other trades and shall make good the Work after them. All work by others shall be protected, and if damaged by this Subcontractor shall be repaired or replaced to the satisfaction of the Contractor and at the expense of Subcontractor.

Subcontractor shall, at his own cost, provide, erect and maintain, at locations designated by Contractor, tool sheds for storing Subcontractor's tools, materials, and equipment, and shall relocate his shanties as requested by Contractor.

Subcontractor shall be responsible for any loss or damage to his tools, materials, and equipment. Subcontractor shall, at his own expense, install and maintain all necessary power equipment and wiring from the temporary service to his various equipment. Contractor shall have the right to utilize Subcontractor's wiring at no additional cost, and Subcontractor shall return when directed to remove all such temporary wiring and equipment, etc.

Subcontractor shall be responsible for pumping and/or properly disposing of all water which the Contractor determines may interfere with the Work.

Specifications and locations of all signs shall be approved by Contractor. Subcontractor agrees at its own expense to carefully protect all of the Work and make good any damage or loss resulting from the action of the elements or otherwise to the Work until final completion and acceptance by Engineer of the entire structure, but Contractor agrees without cost to Subcontractor to keep all Work done by Subcontractor at the site adequately insured against damage by fire.

Subcontractor agrees to comply with all federal, state and municipal rules, ordinances, laws and regulations, and to comply with the requirements of all authorities having jurisdiction and to save Owner and Contractor harmless from all fines having reference to the Work, to give authorities all requisite notices relating to the Work and to procure and pay for all licenses or permits to carry on the Work.

Subcontractor agrees to cooperate with Contractor, other subcontractors, and/or Owner with whose work that of Subcontractor may come in contact. Subcontractor agrees to attend such meetings as may be called by Engineer, Owner, or Contractor.

Article VIII. Subcontractor shall provide proper facilities for testing and inspection by Engineer or Contractor in the field, at shops, or where materials are in course of preparation. Subcontractor shall, within twenty-four (24) hours after receiving written notice from Contractor proceed to remove from the site all materials condemned by Engineer as unsound or improper, and shall make good all work in other lines damaged by such removal. In the event that any portion of the Work condemned should be of a nature, or the time limited, that in the judgment of Engineer or Contractor it would not be expedient to order

same removed or corrected, Contractor may deduct from payments due or to become due to Subcontractor such amount as, in the opinion of the Engineer, shall represent the difference between the fair value of the Work condemned and its value had it been executed in conformity with the drawings and specifications.

Article IX. Contractor shall have the right to make such changes, additions and/or commissions in the Work as it may deem expedient, but no such changes shall be made by Subcontractor except upon written order of Contractor. The amount to be added or deducted from the Price, unless the Work ordered is to be done on a "time and material basis" as in this Article IX provided for, shall be determined by unit prices as herein stated whenever applicable. In connection with all charges, additions and/or omissions to which such unit prices do not apply, Subcontractor agrees to submit to Contractor a detailed estimate of the items, questions, and prices involved, and it is agreed (a) that for additional Work so ordered the addition to the Price shall be the Subcontractor's estimate or the cost to Subcontractor of this material and/or labor, including taxes thereon, contributions required pursuant to agreements with unions and insurance required hereunder by Subcontractor and approved by Contractor plus TEN percent (10%) of that portion of the amount thereof remaining after deducting premiums for overtime, the cost of Social Securtiy, Unemployment, Disability Benefits and any other taxes and contributions applicable to labor, for Subcontractor's overhead expense and profits, whichever is less: (b) that for an omission of any portion of the Work so ordered, a deduction shall be made from the Price equal to the cost to Subcontractor of the material and/or labor omitted including taxes, contributions required pursuant to agreements with unions and insurance required hereunder which would have been payable thereon as estimated by Subcontractor and approved by Contractor, without increase

for overhead expense and profit, or the actual cost and profit attributable to the omission whichever is greater; and (c) that where any such change involves both the addition and omission of material and/or labor the estimated net cost to Subcontractor of the entire change shall be first determined and approved by Contractor and if the result is an addition to the Price such additional amount shall be computed in the manner above defined in connection with subdivision "(a)" of this Article IX, and where any such change results in a deduction from the Price such deduction shall be computed in the manner above defined in connection with subdivision "(b)" of this.

Contractor may order Work to be done on a "time and material basis" and in such event the cost shall be billed at the actual cost to Subcontractor of the material and/or labor required thereof, including taxes thereon, contributions required pursuant to agreements with unions and insurance required hereunder, increased for overhead and profit as provided in subdivision "(a)" of this Article IX, and the amount of such billing when approved by Contractor shall be added to the Price. In case of disagreement as to the adjustment of the Price by reason of any changes, additions and/or omissions ordered pursuant to the provisions of this Article IX, Subcontractor shall proceed diligently with the work so ordered and the disputed matter shall be determined in the manner herein provided for. In case of disagreement as to time extension or price differential, if any, by reason of changes, additions and/or omissions, the matter shall be referred to the Engineer for determination, and his decision shall be final. All changes, additions and/or omissions in the Work shall be executed in accordance with the provisions of this agreement and no such changes, additions and/or omissions shall annul or invalidate this agreement.

Article X. Subcontractor does hereby agree to pay (a) all contributions and payroll taxes of employees of Subcon-

tractor required under any Unemployment Insurance and Disability Benefits Laws, and any contributions required pursuant to agreements with unions, (b) all sales taxes, use taxes, and all other excise and privilege taxes of every kind imposed in respect to any personal property and/or services furnished by Subcontractor. Subcontractor hereby agrees to comply with all rules and regulations now or hereafter promulgated by any authority having jurisdiction for the purpose of completely relieving Owner and/or Contractor from all liability, if any, for the payment of all or any of said contributions, payroll and other taxes; it being understood and agreed that the Price specified in Article III hereof was calculated and determined and the Contractor agreed to pay the same on the basis of Subcontractor's exclusive liability for and agreements to pay all such contributions and payroll taxes and all such sales, use and other taxes in connection with the Work.

Article XI. The Subcontractor shall, at its own expense, if required by the Contractor, furnish a Performance, Labor and Material Bond written by a Surety Company satisfactory to the Contractor.

Article XII. The Price shall be paid by Contractor to Subcontractor only upon signed certificates of Contractor's Superintendent or of Engineer, as follows:

As the Work progresses ninety per cent (90%) of the value of the completed Work done from month to month, shall be paid to the Subcontractor within ten (10) days of the receipt thereof by the Contractor from the Owner, provided, that a separate requisition for labor and material on a form supplied by the Contractor be delivered to the offices of the Contractor at 120 S. Riverside Plaza, Chicago, Illinois 60606 not later than the 25th day of the month during which the work covered thereby was done; and provided further that the unpaid balance of the Price shall at all times be sufficient in the judgment of Architect and/or Contractor, to complete the Work and to pay any

unpaid liens or claims for which Subcontractor is responsible hereunder. Subcontractor whenever requested shall submit to Contractor evidence satisfactory to Contractor (a) of payment by Subcontractor of all indebtedness incurred for the Work; and (b) that Subcontractor has fully complied with all of the terms and conditions of this agreement. If at any time there shall be evidence of any lien or claim for which, if established, Contractor or Owner might become liable, and which is chargeable to Subcontractor, Contractor shall have the right to retain out of any payment due or to become due to Subcontractor an amount sufficient to indemnify Contractor and Owner against such lien or claim and/or the cost of the defense thereof. The final payment shall be made forty (40) days after completion of the project; or such later date as may be necessary to go beyond the lien period as prescribed by law, upon issuance of certificate from Owner that the Work has been done to his satisfaction. The Owner's certificate shall be a condition Precedent to the right of Subcontractor to final payment. Should any claims or liens develop after all payments are made, Subcontractor shall refund to Contractor all moneys that the latter may be compelled to pay in discharging such claims or liens. Applications for payment must show value of materials received at project and work completed to date.

Contractor may from time to time, in order to expedite the Work, make payments to Subcontractor for materials ready for delivery. If Subcontractor is paid for materials before delivered at the site Subcontractor shall provide storage, a bill of sale and five insurance policies protecting Owner and Contractor against loss all in form satisfactory to, and without expense to Contractor.

Article XIII. No progress payment shall be construed to be an acceptance of defective work or improper materials.

Article XIV. Subcontractor agrees not to sublet any portion of the Work or assign any payments hereunder, except with the written consent of Contractor.

Article XV. Subcontractor hereby waives all right of lien existing or that may arise for work performed or material furnished under any lien laws upon the structure, the land upon which the same is situated, and upon any monies due or to become due to Contractor, and agrees to furnish a sufficient waiver of lien in form satisfactory to Contractor from all persons and corporations furnishing labor or materials under Subcontractor, for the structure and the land upon which the same is situated.

All materials, supplies, or equipment to be furnished by Subcontractor and installed or incorporated in the Work shall be free from the rights of vendors under conditional bills of sale, chattel mortgages, or any other encumbrances whatsoever, and upon delivery at the site of the Work, title shall pass immediately to the Owner, subject only to the right of the Subcontractor and/or Contractor to utilize the same in completing the Work. Subcontractor hereby warrants good title to all materials, supplies, or equipment installed or incorporated in the Work.

Article XVI. Subcontractor agrees to indemnify and save harmless Contractor and Owner against all damages which they or either of them may sustain by reason of claims for infringement of patents or unpatented inventions, arising out of the Work and to defray the expense of defending all actions brought against Contractor or Owner founded upon the claim of such infringement.

Subcontractor agrees to assume the risk of all injuries, including death resulting therefrom, to all persons, including Contractor and Owner, their employees or any member of the public, and damage to or destruction of property by whomsoever owned, including loss of use thereof and any other indirect or consequential damages, resulting directly or indirectly, wholly or in part, from the prosecution or any work or obligation undertaken or required by this

agreement and to indemnify and save harmless Contractor and Owner, their subsidiaries or associated companies and their agents, servants and employees, from and against any and all liability, cost or expense arising therefrom, including liability, cost or expense arising in whole or in part from negligence or breach of duty, statutory or otherwise, by Contractor or Owner, their subsidiaries or associations, companies, their agents, servants and employees, whether or not Subcontractor, its agents, servants or employees participated in such negligence or breach of duty, and including all expenses, legal or otherwise, incurred by Contractor or Owner in the investigation, defense and settlement of any claim or suit.

Subcontractor hereby further agrees at its expense to assume the defense of and to defend against any such claim, suit, or other proceeding, to pay any and all costs, charges, attorney's fees, and other expenses and any and all such judgments that may be incurred against the Contractor or Owner, or their said officers, employees, agents, or representatives in or as a result of any such suit or proceeding, Subcontractor shall at once cause the claim, suit or other proceeding to be discharged, dissolved, settled or dismissed by giving bond or otherwise as determined by Contractor.

Article XVII. Subcontractor shall secure before commencing and shall maintain during the performance of the work (a) *Comprehensive General Liability and Property Damage Insurance* with minimum public liability limits of $3,000,000 each occurrence and property damage limits of $3,000,000 each occurrence; (b) Statutory workmen's compensation and occupational disease disability insurance; (c) Employers' liability insurance with limits of $1,000,000 each occurrence; (d) Automobile insurance with public liability limits of $1 million/$3 million and property damages limits of $500,000 each occurrence. Subcontractor shall also furnish to Contractor evidence of

such insurance coverage in the form of certificates of insurance, together with evidence that the insurance carrier has assumed liability of the Subcontractor hereunder and waives any of the terms, conditions, or exclusions contained in the insurance contract which might affect or detract from the coverage for assumed liability of the named insured either by furnishing to the Contractor a properly executed "Assumption of Contractual Liability" endorsement or by Certificate of Contractual Liability Insurance coverage endorsed to provide that the insurance carrier shall provide full coverage for liability assumed by the named insured under its described contract with the Contractor and to any obligation for which the insured or his insurance company may be held liable under any workmen's compensation, occupational disease, unemployment compensation or disability benefits laws, or under any similar law. All certificates of insurance shall stipulate that the Contractor will be given ten (10) days' written notice prior to any change, substitution, or cancellation prior to the normal expiration date.

Article XVIII. Subcontractor guarantees Owner and Contractor against any loss or damage arising from any defect in materials or workmanship furnished under this agreement for a period of ONE year (1) from the date of completion of the entire structure and in addition from all latent defects. Upon written notice, Subcontractor shall proceed with diligence at its own expense to properly replace any defective material or perform any labor necessary to correct any defect in the Work. In case Subcontractor fails upon reasonable notice to replace defective materials or perform any labor necessary to correct any defect in the Work. In case Subcontractor fails upon reasonable notice to replace defective materials or perform labor, then Owner or Contractor may furnish such materials or labor necessary to bring the Work to the standard called for, and Subcontractor agrees to reimburse them promptly for the expense incurred therefor.

Article XIX. Subcontractor acknowledges that this agreement is a complete agreement and is not to be interpreted by reference to any previous document or understanding, except as may be specifically referred to herein. It is understood and agreed that this agreement shall govern whenever any of its provisions conflict with, or are contrary to, any provisions in the drawings, specifications, and addenda thereto.

Article XX. The said parties for themselves and their heirs, successors, executors, administrators or assigns, do hereby agree to the full performance of the covenants herein contained.

Article XXI. Subcontractor further agrees that Executive Order 11246, as amended, relative to equal employment opportunity for all persons without regard to race, color, religion, sex or national origin, and the implementing rules and regulations prescribed by the Secretary of Labor are incorporated herein, and that subcontractor will comply with all provisions of said Order and the rules, regulations and relevant orders issued by the Secretary of Labor. The following Affirmative Action clauses and related regulations of the Secretary of Labor are hereby incorporated herein by reference: (a) Affirmative Action for Handicapped Workers, 41 CFR 60-741.4 and (b) Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era, 41 CFR 60-250.4.

Article XXII. This proposal is subject to the written approval of an Executive Officer of the Company in Chicago, Illinois, and shall not be binding upon the Company until so approved.

IN WITNESS WHEREOF, the parties have caused these presents to be duly signed the day and year first above written.

Signed by Subcontractor in presence of

MERIT CONTRACTING, INC.

_____ by _____

(Title)

Signed by Contractor in presence of

ROBERTS & SCHAEFER COMPANY

/s/ [Illegible]

by /s/ William R. McCue
WILLIAM R. McCUE P.A.

Approved /s/ Paul W. King
PAUL W. KING
Manager of Operations

ROBERTS & SCHAEFER CO.
Eastern Operation
William Penn Plaza
2790 Mosside Blvd.
Monroeville, PA 15146
Phone (412) 373-8020
Fax (412) 373-7065

PURCHASE ORDER NO. 9331-712
Job No. 9331 EIGHTY-FOUR
Date February 14, 1994

PURCHASED FROM:

Merit Contracting, Inc.
600 Park Avenue
Monongahela, PA 15063

Attention: Mr. Larry Hussar
258-9009

SHIP TO:

Construction services required at:
Eighty-Four Mining Co.
Somerset Prep. Plant near
Eighty Four, PA 15330

INSTRUCTIONS: ORDER NUMBERS MUST BE SHOWN ON INVOICES, BILL OF LADING AND SHIPPING TAGS. PREPAID FREIGHT ADDED TO INVOICE MUST BE SUPPORTED BY ORIGINAL FREIGHT BILL OR CHARGES WILL BE DEDUCTED. NO BOXING OR CRATING CHARGES UNLESS SPECIFIED. TRANSPORTATION CHARGES INCLUDING THOSE OF SUBVENDORS SHOULD BE PREPAID AND FREIGHT BILL FORWARDED TO US.

QUANTITY	ITEM	DESCRIPTION	AMOUNT
One Lot	A	RAW COAL STORAGE AND HANDLING FACILITY Furnish UMWA labor, supervision, tools, consumables, and certain materials (as outlined on the following pages of this P.O.) to provide for the electrical installation of the Raw Coal Storage and Handling Facility. Cost Code: 401270 Confirming	$265,000.00

Delivery: Per construction schedule
F.O.B.: Jobsite where applicable
Method: N/A
Freight: N/A
Pricing Basis: Bid documents, site meeting of 5-18-93 and meeting at R&S office on 8-26-93

Taxable ☐ Non-Taxable ☒

William R. McCue
William R. McCue P.A.

THIS OFFER OR PURCHASE ORDER IS EXPRESSLY MADE CONDITIONAL ON ASSENT BY THE SELLER TO ALL TERMS ON FACE AND BACK HEREOF.

00120

176a

To provide the electrical installation for the Eighty Four Mining Co. Raw Coal Storage and Handling Facility. Merit Contracting shall furnish and install:

1. Local jog/stop stations
2. Plug chute switches
3. Lights
4. Lighting panel
5. Lighting transformer
6. Lighting contractor; photoeye
7. Convenience receptacles
8. Junction boxes
9. Grounding materials
10. Safety matting
11. Grounding tests
12. Conduit, fittings, brackets, etc.
13. Wire: Power, controls, instrumentation, PLC communication, RTD's, comunications
14. Wire markers, terminations
15. Methane/CO system wire
16. Two (2) ultrasonic level detectors
17. Limit switches
18. Labor
19. Supervision
20. Start-up assistance
21. Conduit trench

Merit Contracting to install *only* the following Roberts & Schaefer suplied materials:

1. 4160V lineup
2. 4160V/480V transformer
3. 480V motor control center
4. I/O rack enclosure
5. Control panel
6. Vibration transmitters
7. Variable Frequency Drives
8. MCC room heaters
9. Methane/CO system components
10. Sump pump level controls
11. Communication system components
12. Chart recorder
13. Disconnects
14. Additional belt scale
15. Creep drive

[Filed Jan. 4, 1995]

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

No. 94 CH 11635
Judge Hourihane

ROBERTS & SCHAEFER COMPANY,
a Delaware corporation,
Plaintiff,

v.

MERIT CONTRACTING, INC.,
a Pennsylvania corporation,
Defendant.

NOTICE OF MOTION

TO: Amy E. Bentz
PLOWMAN SPIEGEL & LEWIS, P.C.
925 Grant Building
Pittsburgh, Pennsylvania 15219

On January 13, 1995 at 9:30 a.m. or as soon thereafter as counsel may be heard, I shall appear before the Honorable Judge Hourihane or any judge sitting in his stead, in the courtroom 2402 usually occupied by him in the Richard J. Daley Center, Chicago, Illinois and shall then and there move this Honorable Court pursuant to the attached Motion.

Bollinger, Ruberry & Garvey Atty For: Plaintiff
500 West Madison Street,
Suite 2300
Chicago, Illinois 60661
(312) 466-8000

[Filed Jan. 4, 1995]

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

No. 94 CH 11635
Judge Hourihane

ROBERTS & SCHAEFER COMPANY,
a Delaware corporation,
Plaintiff,

v.

MERIT CONTRACTING, INC.,
a Pennsylvania corporation,
Defendant.

MOTION FOR LEAVE TO INITIATE DISCOVERY

NOW COMES the Plaintiff ROBERTS & SCHAEFER COMPANY, by and through its attorneys Bollinger, Ruberry & Garvey, and moves this honorable Court for leave to initiate discovery pursuant to Illinois Supreme Court Rule 201(d). In support thereof, Plaintiff states as follows:

1. That Plaintiff's counsel has had discussions with counsel for MERIT CONTRACTING, INC. ("Merit"). As a follow up to those discussions, counsel for Plaintiff advised counsel for Merit by letter, that this action was filed. As such, Merit's counsel is on notice of this action.

2. That Plaintiff wishes to begin non-party discovery, and to place Merit on notice of discovery to be answered in order to expedite these proceedings.

3. That no prejudice will result from the initiation of discovery before Merit has appeared.

WHEREFORE, the Plaintiff, ROBERTS & SCHAEFER COMPANY prays this honorable Court to enter an order permitting discovery to proceed, and to schedule a status date in this cause.

Respectfully submitted,

By /s/ Linda Urbanik Johnson
One of the attorneys for
ROBERTS & SCHAEFER COMPANY

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

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94 CH 11635

ROBERTS & SCHAEFER COMPANY,
a Delaware corporation,
Plaintiff,

v.

MERIT CONTRACTING, INC.,
a Pennsylvania Corporation,
Defendant.

Please Serve:

MERIT CONTRACTING, INC.
600 Park Avenue
Monongahela, Pennsylvania 15063

SUMMONS

To each defendant.

YOU ARE SUMMONED and required to file an answer in this case, or otherwise file your appearance in the office of the clerk of this court (located in the Richard J. Daley Center, Room #802 Chicago, Illinois 60602), within 30 days after service of this sumons, not counting the day of service. IF YOU FAIL TO DO SO, A JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF ASKED IN THE COMPLAINT, A COPY OF WHICH IS HERETO ATTACHED.

To the officer.

This sumons must be returned by the officer or other person to whom it was given for service, with indorsement of service and fees, if any, immediately after service. If service cannot be made, this summons shall be returned so indorsed. This sumons may not be served later than 30 days after its date.

WITNESS, Dec. 28, 1994

Clerk of court

Date of service: ————————, 19——

(To be inserted by officer on copy left with defendant or other person)

Atty No. 13507
Name Bollinger, Ruberry & Garvey
Attorney for Defendant
Address 500 West Madison Street
City Chicago, Illinois 60606
Telephone (312) 466-8000